No. 92-1441-CFY
Status: GRANTED

Title: Harold E. Staples, III, Petitioner
v.
United States

Docketed:
March 4, 1993

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: DeAngelis,Jennifer

Counsel for respondent: Solicitor General

1-22-93 ext til 3-4-93, J. White, CITED.

Entry	Date	Note	Proceedings and Orders
1	Jan 21 1993	G	Application (A92-559) to extend the time to file a petition for a writ of certiorari from February 2, 1993 to April 3, 1993, submitted to Justice White.
2	Jan 22 1993		Application (A92-559) granted by Justice White extending the time to file until March 4, 1993.
3	Mar 4 1993	G	Petition for writ of certiorari filed.
5	Apr 5 1993		Order extending time to file response to petition until May 5, 1993.
6	May 3 1993		Brief of respondent United States filed.
7	May 5 1993		DISTRIBUTED. May 21, 1993
8	May 24 1993		Petition GRANTED.
			**********
9	Jun 14 1993	G	Motion of petitioner to dispense with printing the joint appendix filed.
10	Jun 21 1993		Motion of petitioner to dispense with printing the joint appendix GRANTED.
11	Jul 7 1993		Brief of petitioner Harold Staples filed.
12	Aug 2 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Tenth Circuit.
13	Aug 9 1993		Brief of respondent United States filed.
14	Oct 6 1993		CIRCULATED.
15	Oct 14 1993		SET FOR ARGUMENT TUESDAY, NOVEMBER 30, 1993. (2ND CASE).
16	Nov 24 1993		Record filed.
		*	Original record proceedings United States District Court, Northern District of Oklahoma.
17	Nov 30 1993		ARGUED.

92-1441

No. 92-___

Supreme Court, U.S.
FILED
MAR 4 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

HAROLD E. STAPLES, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when enacting 26 U.S.C. § 5861(d) and 26 U.S.C. § 5845 of the National Firearms Act, and 18 U.S.C. § 922(o)(Supp. 1992), Congress intended to create a strict liability crime whereby the government must only prove that the defendant knew the device he possessed was a gun in the general meaning of that term to secure a felony conviction for "knowing" possession of an unregistered "machinegun" in violation of the National Firearms Act.

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No. 92-___

In The

Supreme Court of the United States

October Term, 1992

HAROLD E. STAPLES, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 971 F.2d 608 (10th Cir. 1992) and is reproduced in the Appendix (hereinafter "App.") at 1a-31a. The judgment denying appellant's Petition for Rehearing is unpublished and is reproduced in App. 32a-33a. The judgment and sentence of the United States District Court dated February 20, 1991, is unpublished and is reproduced in App. 37a-43a. The Order denying defendant's Motion for Judgment of Acquittal is dated February 1, 1991, and is reproduced in App. 34a-36a. On January 22,

1993, this Honorable Court granted Petitioner an extension of time to file this Writ until March 4, 1993.

JURISDICTION

On August 3, 1992, the court of appeals affirmed the judgment of the district court thereby upholding the felony conviction of Harold E. Staples, III. On November 4, 1992, the court of appeals denied Mr. Staples' petition for rehearing and suggestion of rehearing *en banc*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

The text of the following statutes are reproduced in the Appendix:

18 U.S.C. § 922(o)(Supp. 1992)
26 U.S.C. § 5845(a)
26 U.S.C. § 5845(b)
26 U.S.C. § 5861(d)

STATEMENT OF THE CASE

Proceedings in the Courts Below

Petitioner was charged in an indictment filed July 12, 1990, with knowingly receiving and possessing two firearms alleged to have been modified so as to be machineguns in violation of 26 U.S.C. § 5861(d). "Firearms" as defined by the National Firearms Act (26 U.S.C.

§ 5845(a)) include "machineguns," statutorily defined in 26 U.S.C. § 5845(b). The firearms involved in this case were an M-1 .30 caliber World War II Carbine Rifle (hereinafter the "M-1") and an SGW .223 caliber model X M14A1 rifle (minus certain parts and hereinafter referred to as the "AR-15"). The jury found petitioner not guilty of charges relating to the M-1 because the petitioner was not in "knowing possession" of the M-1. However, petitioner was convicted of knowing possession of an unregistered "machinegun" (the AR-15) on December 19, 1990. At the close of the government's case and at the close of all the evidence, the petitioner moved the trial court for a judgment of acquittal, and on December 26, 1990, he filed a written version of the motion. All motions were overruled by the court by written order filed February 1, 1991.

On February 20, 1991, the district court entered its judgment and imposed a suspended sentence, placing petitioner on probation for five years, requiring him to dispose of all guns and refrain from possessing guns of any kind, and fining him $5,000.00 and a $50.00 monetary assessment.

On March 18, 1991, petitioner filed motions to stay execution of his sentence pending appeal, which motions were granted by the trial court. Petitioner filed his timely notice of appeal on February 22, 1991, and commenced his appeal to the Tenth Circuit. On August 3, 1992, the court of appeals affirmed the conviction. On August 17, 1992, the petitioner filed his petition for rehearing with suggestion for rehearing *en banc*, which the court of appeals denied on November 4, 1992, affirming its initial decision.

Facts

On December 29, 1989, at approximately 7:00 p.m., law enforcement officers representing the City of Jenks Police Department and the Bureau of Alcohol, Tobacco and Firearms (hereinafter "BATF") conducted a search of petitioner's home and seized the M-1 and AR-15 rifles, a rifle bolt of unspecified nomenclature and manufacture, and a Beeman 552, 3 x 21 scope.

The AR-15 rifle is a civilian, semi-automatic version of the United States Military M-16 standard issue rifle. There are certain differences between the component parts of the fully automatic M-16 and the semi-automatic, legal counterpart, the AR-15 rifle. Five parts used in the manufacture of these two rifles come in both "automatic" and "semi-automatic" versions: the bolt carrier, the selector switch, the trigger, the disconnector, and the hammer. However, even though an AR-15 can be assembled with the fully automatic versions of the bolt carrier, selector switch, trigger, disconnector, and hammer, the gun is still not fully automatic without one additional part, the "sear" or "auto-sear." Thus, the exclusively semi-automatic versions of the bolt carrier, selector switch, trigger, disconnector and hammer are called "AR-15 parts," while the *not exclusively* fully-automatic parts of the same nomenclature are sometimes referred to as "M-16 parts." The sear, or auto-sear, has no semi-automatic counterpart and therefore, in all cases, would be called an M-16 part.

Despite this difference between M-16 parts and AR-15 parts, many "after-market" manufacturers of civilian, semi-automatic models of these rifles have made and

sold large numbers of the AR-15's not out of strictly semi-automatic AR-15 parts but instead out of the five M-16 fully automatic parts – the M-16 versions of the bolt carrier, selector switch, trigger, disconnector, and hammer, but minus the critical "auto-sear." The reason for this is that the market became flooded with "military-reject" fully automatic M-16 internal parts. Civilian AR-15's equipped with M-16 internal parts were less costly to construct than AR-15's assembled with the more expensive, strictly semi-automatic parts. The AR-15 involved in this case contains *internal* M-16 parts but lacks the auto-sear. The government's expert testified that the AR-15 rifles containing internal M-16 components are still legal, semi-automatic AR-15 rifles, provided that they are not equipped with the auto-sear.

The indictment, filed almost seven months after the BATF's search, charged the petitioner with knowingly receiving and possessing unregistered firearms in violation of 26 U.S.C. §§ 5861(d), 5841 and 5871 of the National Firearms Act. It was uncontested that the M-1 was lawfully registered to the petitioner's father on the National Firearms Registry. Apparently finding that the petitioner had been unaware that the weapon was in his home, the jury found him not guilty of "knowing possession" of the M-1 rifle.

At the time BATF agent Jobson seized the AR-15, it was in a state of disrepair and missing its bolt carrier and magazine. The petitioner testified that the AR-15 had been defective from the date of purchase forward, and that it would not fire even semi-automatically while in his possession. This testimony was fully corroborated by three witnesses. David Seabolt, the defendant's nephew

and an infantry soldier in the National Guard, testified that the gun had been in his possession for a number of years before leaving it at petitioner's residence, that he considered the AR-15 to be his and that he could never get it to "work right." Brian Jobson, son of BATF agent Lewis Jobson, testified that the weapon was malfunctioning and would in essence jam after discharging one shot. Another witness, Chris Peak, testified to similar facts.

Even though the AR-15 was disassembled, missing critical parts and in a state of disrepair, the government prosecuted the petitioner because, it claimed, the gun was nonetheless capable of firing multiple shots with a single trigger pull. The government's evidence was that BATF agents, after seizing the inoperable and disassembled AR-15, re-assembled it with a different bolt carrier, not the one with which it was originally equipped, cleaned and oiled it thoroughly, and loaded it with soft primer ammunition. After the government made these adjustments, BATF Agent McLaughlin managed to cause the gun to fire multiple shots with a single trigger pull despite the missing auto-sear. The government's theory as to why the AR-15 could now malfunction to fire "fully automatic" was that apparently it had been modified by the petitioner by filing down the selector switch, allowing it to fire "fully automatic."[1] It was undisputed that the AR-15 had no auto-sear and had not been modified to accommodate an auto-sear.

---

[1] The Government's evidence that the AR-15 selector switch had been filed down prior to the government's seizure of the weapon was contested by the defendant and is discussed more fully herein at sub-section F.

The petitioner called two experts to testify in his defense, Bill Fleming and Charles Fagg. Mr. Fleming testified that AR-15 rifles with internal M-16 components but no auto-sear will not fire "automatically more than one shot with a single pull of the trigger" but that "occasionally you will get a malfunction" resulting in two or three sporadic shots with a single pull of the trigger. Mr. Fleming also testified that an AR-15 can be induced to malfunction in this way, by "down loading" the magazine, using special ammunition and thoroughly cleaning and oiling of the rifle, but that the filing off of the selector switch alone would not make the AR-15 a "machine gun."

This malfunction of an AR-15 equipped with internal M-16 components, known as "hammer follow through," "hammer follow down" or "slam down," was described on direct examination by defendant's expert witness. The prosecution expert, BATF agent McLaughlin, conceded that when hammer follow down occurs, the AR-15 is not *reliably* firing multiple shots with a single trigger pull.

The evidence below is summarized as follows:

1. When the AR-15 was seized from the petitioner, it was "totally disassembled" and non-functional.

2. During the seven months *after* seizure, the government re-assembled the AR-15, inserted parts, which were not the original parts, loaded it with soft-primer ammunition and it malfunctioned by sporadically firing more than one shot with a single trigger pull.

3. Four witnesses, including the petitioner, testified that the AR-15 never produced multiple shots with a single trigger pull while possessed by the petitioner and

in fact all testified that it rarely properly functioned even semi-automatically.

4. The selector stop was filed off the AR-15 by someone at sometime. The government never submitted any proof that the petitioner filed off the stop. In fact, metal filings appear on the photo made by the government one year after the AR-15 was seized.

5. An AR-15 with internal M-16 components, absent an auto sear, even without a selector stop, is not a weapon in any way violative of the National Firearms Act.

6. AR-15's with internal M-16 components are owned and traded by literally thousands of sportsmen who have no reason to know of the hammer follow down malfunction.

7. An AR-15 with internal M-16 components could malfunction, a phenomenon known by the government to be hammer follow down, causing at times multiple shots with a single trigger pull. This malfunction did not occur when the petitioner was in possession of his AR-15. Further, the petitioner had no reason to believe he was in possession of any illegal device. He innocently believed he possessed a perfectly legal sporting rifle.

The petitioner was convicted of a felony as a result of a jury instruction making possession of this unregistered "firearm" a strict liability crime.

ARGUMENT

A. INTRODUCTION

THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE UNITED STATES COURTS OF APPEALS AS TO WHETHER THE GOVERNMENT MUST PROVE THAT THE DEFENDANT KNEW THE WEAPON HE POSSESSED WAS A "FIREARM" AS THAT TERM IS DEFINED BY THE NATIONAL FIREARMS ACT.

This Honorable Court should grant certiorari and clarify what degree of knowledge the government must prove to secure a conviction for "knowing possession of an unregistered firearm" pursuant to 26 U.S.C. § 5845, 26 U.S.C. § 5861(d) and 18 U.S.C. § 922(o)(Supp. 1992). The United States Courts of Appeals have enunciated wide-ranging and conflicting rules on this issue, and a uniform rule should be established. The conflict consists of three different positions among the Circuit Courts of Appeals on the mental state required for a conviction for alleged violations of 26 U.S.C. § 5861(d). The First, Fourth, Seventh, Eighth and Tenth Circuit Courts allow conviction without any evidence presented as to the defendant's knowledge that the item he possessed was a "firearm" as that term is defined by the Act. The Fifth, Sixth and District of Columbia Circuit Courts in more recent decisions require proof that the defendant knew he possessed a "firearm" as defined by the Act. The Ninth Circuit follows the strict liability rule except where the weapon has no "external indicia" alerting the defendant to the likelihood that it may be regulated under the Act.

In the instant case, the Tenth Circuit held that the government is not required to prove actual knowledge of

a weapon's physical properties. *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992), following *United States v. Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988). The court further upheld the district court's jury instructions on the issue of scienter, which instructions stated:

> **Essential Elements of the Crime (26 U.S.C. § 5861(d))**
>
> In order to establish the offense charged in the indictment, each of the following essential elements must be proved beyond a reasonable doubt:
>
> First: that the defendant knowingly possessed the firearm described in the Indictment; and
>
> Second: that such firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.
>
> The unlawful offense is complete when the two separate elements just stated are proved.
>
> **Knowingly to Possess**
>
> A person is knowingly in possession if his possession occurs voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted of possession of a firearm if he did not intend to possess it.
>
> The Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril.
>
> **Mere Possession of Unregistered Firearm**
>
> Mere possession of an unregistered firearm is a violation of the law of the United States. *It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed it.* (Emphasis added.)

The trial court refused petitioner's requested instructions on the knowledge issue, which read as follows:

> The National Firearms Act requires no specific intent or knowledge that a machine gun is unregistered. It makes it unlawful for any person to receive or possess a firearm which is not registered to him. The only knowledge required to be proved is knowledge that the instrument possessed is a machinegun.
>
> An essential element of the offense of possessing a machine gun, is that the possessor knew that the gun would fire fully automatically and the burden is upon the Plaintiff to prove that specific knowledge.

The trial court's jury instructions set forth above reflect an interpretation of the National Firearms Act that possession of an unregistered "firearm" as defined in 26 U.S.C. § 5845 is a strict liability crime. This Court has not ruled on this issue as it relates to rifles which, unbeknownst to a defendant, allegedly have been modified to be "firearms" in the sense of the Act. A discussion of

applicable United States Supreme Court decisions and an analysis of the conflict in the law among the Circuits follows.

B. UNITED STATES SUPREME COURT DECISIONS ANALYZING SCIENTER

The United States Courts of Appeal have decided the scienter issue relying upon United States Supreme Court decisions. Some Courts of Appeal have erroneously extended the holding of *United States v. Freed*, 401 U.S. 601 (1971), finding that *Freed* stands for the proposition that knowledge of the *type of device* possessed by the defendant is not required to secure a conviction for knowing possession of an unregistered "firearm." The Petitioner urges this Court to settle this important federal question. An analysis of pertinent United States Supreme Court decisions follows.

An oft-quoted legal premise arose from this Court's opinion in *Morissette v. United States*, 342 U.S. 246 (1952):

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. *Morissette*, 342 U.S. at 250, 251.

In *Morissette*, the defendant salvaged spent bomb casings belonging to the United States and sold them for $84.00. He was convicted pursuant to 18 U.S.C. § 641 which provides that "whoever embezzles, steals, purloins or knowingly converts" government property is punishable by fine and imprisonment. The defendant had no criminal record. He testified that he believed the casings were abandoned and that he did not intend to steal them. The statute under which the defendant was convicted omitted criminal intent as an element of the offense. The Court held that the mere omission of any mention of intent will not be construed as eliminating that element from the crimes denounced. *Morissette*, 342 U.S. at 263. The Court reasoned:

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common law crimes on judicial initiative. *Morissette*, 342 U.S. at 263.

Almost twenty years later, this Court decided *United States v. Freed*, 401 U.S. 601 (1971). The *Freed* decision has been extensively relied upon by federal appellate courts

in deciding the issue of *scienter* and its application, if any, under the National Firearms Act. In *Freed*, this Court upheld the amended provisions of the National Firearms Act as not violative of the Self-Incrimination Clause of the Fifth Amendment. More pertinent to this case, the Court in *Freed* concluded that the "District Court erred in dismissing the indictment for absence of an allegation of *scienter*" for knowing possession of an unregistered firearm, a hand grenade. *Freed*, 401 U.S. at 607.

In reaching its rule in *Freed*, this Court stated:

> This is a regulatory measure in the interest of public safety, *which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act*. They are highly dangerous and offensive weapons, no less dangerous than the narcotics involved in *United States v. Baliant*, 258 U.S. 250, 254 . . . *Freed*, 401 U.S. at 609. [Emphasis added.]

Thus, this Court in *Freed* held that ignorance of the law is no excuse in finding that it was no defense that the defendant did not know of the regulation. Justice Brenan states as follows in his concurring opinion:

> The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades. Thus, while the Court does not hold that no intent at all need be proved in regard to one element of the offense - the unregistered status of the grenades - knowledge must still be proved as to the other two elements [that the appellees possessed certain

> items and that the items possessed were hand grenades]. Consequently, the National Firearms Act does not create a crime of strict liability as to all its elements. *Freed*, 401 U.S. at 612.

Despite this pronouncement, United States Courts of Appeal have cited *Freed* for the holding that sufficient intent is established if the defendant is shown to have possessed an item which he knew to be a firearm in the general meaning of that term. *See, Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977); *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987); *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987); *United States v. DeBartolo*, 482 F.2d 316 (1st Cir. 1973).

The *Freed* decision was relied upon by this Court in deciding *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971), where the defendant was charged by information that he shipped sulfuric acid and hydroflusilicic acid in interstate commerce and knowingly failed to show on the shipping papers the required classification of said property. *International Minerals*, 402 U.S. at 559. The district court dismissed the information for the government's failure to allege a "knowing violation." The defendant claimed he did not know of the registration requirement. This Court again followed the premise that "ignorance of the law is no excuse." *International Minerals*, 402 U.S. at 563. However, even under *International Minerals*, mistake of fact would still be a defense:

> So far as possession, say, of sulfuric acid is concerned, the requirement of "*mens rea*" has

been made a requirement of the Act as evidenced by the use of the word "knowingly." *A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered. International Minerals*, 402 U.S. at 563, 564. [Relying on *Morissette v. United States*, 342 U.S. 246 (1952); emphasis added.]

Thus, the Court in *International Minerals* distinguished knowledge of the regulatory scheme or the extent of its reach, which is not an element of the offense, from knowledge of the nature or condition of a thing that causes it to be regulated, which is an element of the offense. The courts applying the strict liability standard (see next section) ignore or misunderstand this Court's distinction in *International Minerals*.

C. *DECISIONS OF COURTS OF APPEALS INTERPRETING THE NATIONAL FIREARMS ACT TO BE A STRICT LIABILITY FELONY CRIME*

Relying upon the foregoing Supreme Court decisions, the Circuit Courts of Appeals have formulated inconsistent rules on the *scienter* issue. In *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987), the defendant possessed some fifty guns, ten of which were originally legal semi-automatic rifles that had been internally altered to fire automatically. The defendant contended that the government must prove that he had specific knowledge of the automatic firing capability of the weapons. *Shilling*, 826 F.2d at 1367. Although the court noted that "there is substantial circumstantial evidence that Shilling knew the weapons were converted," *Id.* at 1368, it held (*per curiam*):

> Sufficient intent is established if the defendant is shown to have possessed an item which "he knew to be a firearm within the general meaning of the term," *Shilling*, 826 F.2d at 1368, citing, *Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977); *United States v. Decker*, 292 F.2d 89 (6th Cir. 1961); and *United States v. Gonzalez*, 719 F.2d 1516 (11th Cir. 1983).

As noted in *Shilling*, the Eighth Circuit Court of Appeals advocates the position that the government need only prove that the defendant "possessed an item which he knew to be a firearm within the general meaning of that term." *Morgan v. United States*, 564 F.2d 803, 805 (8th Cir. 1977). The defendant in *Morgan* was convicted for knowing possession of a Colt M-16 machine gun despite his contention that he had no knowledge that it was designed to fire automatically.

The First Circuit Court of Appeals in *United States v. DeBartolo*, 482 F.2d 312 (1st Cir. 1973), ruled on this issue when the defendant was in possession of a "sawed-off" shotgun that was unregistered. The defendant claimed that he did not know the shotgun had a barrel length under 18 inches long. The court held that the defendant must only know that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation.

> A shotgun in today's society plainly falls within this category. One knowingly participating in the sale of such a lethal instrumentality cannot escape liability by failing to inspect the length of its barrel any more than by failing to inquire into whether it is registered. *DeBartolo*, 482 F.2d at 316.

The Seventh Circuit Court of Appeals follows the rule stated in *Shilling* and *Morgan*, supra. In *United States v. Ross*, 917 F.2d 997 (7th Cir. 1990), the defendant was in possession of a 1915 French Chauchet machine gun which had a plug of weld inside its chamber rendering it incapab'e of firing a shot. The defendant contended he did not register the gun because he believed it to be only a replica, but the BATF showed that the gun could be readily restored to shoot. *Ross*, 917 F.2d at 998. In a *per curiam* decision, the court held:

> The crime is possessing an unregistered firearm, – not "knowingly" possessing an unregistered firearm, or possessing a firearm knowing it to be a firearm, or possessing a firearm knowing it to be unregistered. There is no knowledge requirement in § 5861(d) . . . Traditional notions of punishment require consciousness of the acts being done. But some statutes create liability without knowledge, and the principal question in *Freed* was whether § 5861(d) is such a statute. The Court held that it is – at least to the extent the prosecution need not prove that the defendant was aware that the weapon was unregistered. Although the Court did not address whether the defendant needed to know that the item was a "firearm" in either lay or legal senses, the holding that § 5861(d) dispenses with any mental state concerning one element of the offense implies that mental states are unnecessary concerning the others in the same subsection. *Ross*, 917 F.2d at 1000.

The Tenth Circuit decision of *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988), follows the rules adopted by the First, Fourth,

Seventh and Eighth Circuits. The evidence in *Mittleider* was that the defendant had acquired a semi-automatic J-15 rifle which had been converted to fully automatic by the time he sold it to an undercover agent. The defendant also sold a semi-automatic AR-15 rifle with a conversion kit to the same agent. The *Mittleider* court concluded that the defendant had actual knowledge that his guns were in fact fully automatic but extended its holding to encompass even defendants without such knowledge. The court stated:

> We are in accord with the rule adopted by the Fourth Circuit in *Shilling* that the government is not required to prove actual knowledge of a weapon's physical properties. *Id.* at 774.

The *Mittleider* rule was followed in the Tenth Circuit's decision below in *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992). The *Staples* decision is discussed at length in Section F herein.

D. DECISIONS OF COURTS OF APPEALS REQUIRING PROOF OF SCIENTER UNDER THE NATIONAL FIREARMS ACT

Three of the Circuit Courts of Appeals require the government to prove that accused knew he possessed a "firearm" as defined in the National Firearms Act. The Fifth Circuit's *en banc* decision of *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989), is the leading case. Defendant Anderson was convicted for possessing two fully automatic pistols and silencer parts. The jury was instructed that the government need only prove the that the defendant knew the guns were firearms in a general

sense. *Anderson*, 885 F.2d at 1249. The initial appellate decision at 853 F.2d 313 (5th Cir. 1988) upheld the conviction with reservations:

> We have some concern that allowing a person to be convicted of a very serious offense like the one involved here, without requiring knowledge of such facts as would alert a reasonable person to the likelihood of regulation, in this case knowledge that the two pistols could fire or had been modified to fire automatically, might be inconsistent with the due process clause of the Fifth Amendment. *Anderson*, 853 F.2d at 313, 318.

After rehearing *en banc*, the Fifth Circuit noted that "where a wrong turn has been taken, back is the shortest way forward" and reversed Anderson's conviction, overruling that court's own precedent. *Anderson*, 885 F.2d at 1255. The court emphasized the technical meaning of the term "firearm" as used in the Act, a meaning which "bears little if any correspondence to that in common usage," *Id.* at 1250, a point that this Court recently made, too, when it said that "the word 'firearm' is a term of art in the NFA." *United States v. Thompson/Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102 (1992). The *Anderson* court distinguished cases with facts existing in *Anderson* (and *Staples*) from those in *United States v. Freed, supra*:

> It is one thing for the Court to liken hand grenades to narcotics, as it did in *Freed*, quite another to draw such a parallel where ordinary skeet guns or target rifles are concerned. For the National Firearms Act does not treat conventionally manufactured, normal revolvers, semiautomatic pistols, hunting rifles or shotguns as

anything other than perfectly innocent legal items. *Anderson*, 885 F.2d at 1254.

The court further stated:

> We think it far too severe for our community to bear – and plainly not intended by Congress – to subject to ten years imprisonment one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol, merely because it has been, unknown to him, modified to be fully automatic. *Anderson*, 885 F.2d at 1254.

Thus, the *Anderson* court held:

> Although § 5861(d) does not contain express wording such as "knowingly" – imposing a *mens rea* requirement, it is well settled that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a *mens rea* requirement. *Anderson*, 855 F.2d at 1253. [Citing *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Bailey*, 444 U.S. 394 (1980); and *Morissette v. United States*, 342 U.S. 246 (1951).]

Relying in part on the *dicta* in the first *Anderson* decision, the Sixth Circuit has also concluded that the government must show that defendants knew that a "firearm" as legislatively defined was being transferred. *United States v. Williams*, 872 F.2d 773, 777 (6th Cir. 1989).

In *Williams*, the defendant appealed convictions for willfully and knowingly transferring an unregistered fully automatic weapon which had been converted from a

semi-automatic to a fully automatic rifle by internal modifications without changing the external appearance of the gun. *Williams*, 872 F.2d at 774. The court quoted extensively from *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983), *cert. denied*, 464 U.S. 821 (1983):

> . . . [W]e do not find that an ordinary firearm that is internally and undetectably modified to be automatic yet legal in appearance and markings fall within the category of [a dangerous device of such type as would alert one to the likelihood of regulation]. If the law was as stated in this instruction then any person who possessed an internally modified weapon with absolutely no knowledge or method of verification of the modification would be in violation of the law. We are sure that Congress did not intend to be so draconian. *Williams*, 872 F.2d at 776.

The *Williams* court further stated that "the elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where the conviction does not gravely besmirch." *Williams*, 872 F.2d at 777. That is certainly not the case with a felony conviction under the Act.

The *Anderson* and *Williams* decisions were cited with approval by the District of Columbia Circuit Court of Appeals in *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992). The jury in *Harris* was charged "to convict [under 5861(d)] if it found that the defendants knowingly possessed a weapon and that the weapon was in fact a machinegun." *Harris*, 959 F.2d at 258. The *Harris* court stated:

> It may well be that all guns of whatever kind are dangerous, but Congress decided to require registration of only certain kinds of firearms that it thought were highly dangerous. Were we to accept the government's argument that so long as a defendant has knowledge that he possesses a gun of any type, the defendant is absolutely liable for possessing a proscribed "firearm," we would implicitly expand Congress' negative judgment concerning the possession of certain particularly dangerous guns to all guns.

The circuits are split on this issue. The government's position has been accepted in five circuits, *see United States v. Shilling*, 826 F.2d 1365, 1367-68 (4th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S.Ct. 777, 98 L.Ed.2d 863 (1988); *United States v. Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1984)); *Morgan v. United States*, 564 F.2d 803, 805 (8th Cir. 1977); *United States v. Ranney*, 524 F.2d 830, 832 (7th Cir. 1975), *cert. denied*, 424 U.S. 922, 96 S.Ct. 1130, 47 L.Ed.2d 330 (1976); *United States v. DeBartolo*, 482 F.2d 312,316 (1st Cir. 1973), and rejected in three, *see United States v. Anderson*, 885 F.2d 1248, 1251 (5th Cir. 1989) (en banc); *United States v. Williams*, 872 F.2d 773, 777 (6th Cir. 1989); *United States v. Herbert*, 698 F.2d 981, 986-87 (9th Cir.), *cert. denied*, 464 U.S. 821, 104 S.Ct. 87, 78 L.Ed.2d 95 (1983). *We agree with the latter group, which we note, includes the more recent cases.*

We think the reasoning of the Fifth, Sixth, and Ninth Circuits *comports better with the traditional understanding of the criminal law as punishing only truly culpable conduct. See Liparota v. United*

States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). [Emphasis added.]

Harris, 959 F.2d at 260.

Subsequent to the *United States v. Herbert* decision, cited in the quote from *Harris*, above, the Ninth Circuit decided *United States v. O'Mara*, 963 F.2d 1288 (9th Cir. 1992), wherein it adopted a strict liability standard to be applied in certain instances, thereby creating a three-way split among the Circuit Courts of Appeals on the *mens rea* issue.

E. THE NINTH CIRCUIT'S DOUBLE STANDARD

The Ninth Circuit Court of Appeals appears to apply two distinct standards on the *mens rea* element depending on the external characteristics of the weapon involved. In *United States v. O'Mara, supra*, the defendant testified that he believed the weapon to be a semi-automatic replica of a "Sten," even though the gun had a "visible, external selection switch designed to permit firing in both semi-automatic and automatic modes." *O'Mara*, 963 F.2d at 1291. The court ignored the defendant's testimony finding:

> Under the cases of this circuit, there is strict liability under the statute when the firearm in question, by its very nature or appearance, alerts its owner of the likelihood of regulation. Our cases recognize an exception where the nature of the weapon is not evident.

O'Mara, 963 F.2d at 1291.

In *United States v. Kindred*, 931 F.2d 609 (9th Cir. 1991), the defendant was convicted of possessing an unregistered firearm, an inoperable World War I vintage German machine gun. The gun seized by the government had no ammunition and was missing several important parts, including the bolt, firing pin and breech block. *Kindred*, 931 F.2d at 610. An expert for the government testified that although the gun could not fire, it was possible to restore the gun to firing condition. The court held:

> To secure a conviction under the Act, the government must prove that the defendant knew that he possessed a dangerous device of a type that would alert one to the likelihood of regulation. *Kindred*, 963 F.2d at 612.

In *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983), *cert. denied*, 464 U.S. 821 (1983), the Ninth Circuit affirmed the conviction of one defendant for knowing possession of unregistered firearms which had been converted only *internally* to machine guns because the court found "overwhelming evidence that John Herbert knew that the weapons were automatic." *Herbert*, 698 F.2d at 987.

Apparently, then, in the Ninth Circuit, where the external characteristics of the gun would not necessarily alert its owner to the "likelihood of regulation," the government must prove knowledge that the gun was a "firearm" in the sense of the Act. But where those characteristics are apparent, the Ninth Circuit applies strict liability as in *O'Mara*.

F. THE CONFLICTING INTERPRETATIONS OF THE NFA LEAD TO UNFAIR AND INCONSISTENT RESULTS, REQUIRING THE ADOPTION OF A UNIFORM RULE ON THE ISSUE OF SCIENTER

The split in the Circuit Courts of Appeals on the question of *mens rea* or scienter is not an academic problem, especially in cases where, as here, there is evidence that, though the accused knew he was in possession of a firearm in the lay sense of the word, he *may not have known* he possessed a firearm which, as a result of physical modifications and special loading techniques, either was or had the potential to be a "firearm" within the meaning of the Act.

The evidence below was that Mr. Staples purchased the AR-15 at an annual gun show in Tulsa, Oklahoma, in 1983, and gave it to his nephew, Seabolt, in the summer of 1983. The petitioner testified that at all times when the AR-15 was in his possession, it was non-functional due to its defective bolt carrier. The evidence was undisputed that post-seizure, the government installed a bolt carrier, not the original bolt carrier, cleaned and oiled the weapon, used soft primer ammunition and caused the gun to fire sporadically multiple shots with a single trigger pull. At some point in time, the selector switch had been modified to allow the switch to turn to automatic mode but this modification alone would not cause an AR-15 to fire multiple shots with a single trigger pull.

The government's photographer, Robert Yerton, testified that he photographed the AR-15 and the modified switch on December 13, 1990, almost one year after the gun was seized from the defendant's home. BATF Agent

Lowell Sprague testified that he photographed all seized evidence at the Staples' garage on December 29, 1989, but these photographs were never introduced in evidence and no testimony was elicited regarding the condition of the selector switch at the time of seizure. Although BATF Agent Blair Ward testified that "when he saw . . . the receiver of this weapon . . . he saw a dot on the side of the receiver [and] . . . that indicated that the post had been grinded off to go into fully automatic position," the time frame of Mr. Ward's examination was never established. Further, Mr. Yerton conceded that in his December 13, 1990 photograph there appeared to be metal filings around the stop, arguably evidencing a RECENT grinding of the stop. Petitioner himself clearly testified that he did not know about the modification of the stop, and that the gun at all times in his possession malfunctioned, rarely firing even one shot with a single trigger pull. The petitioner believed he was in possession of a legal sporting rifle.

With the jury instructions quoted in section A, above, and approved by the Tenth Circuit in *Staples*, the petitioner was deprived of the benefit of all of the foregoing evidence tending to show he lacked knowledge of the gun's potential to fire automatically, and he was convicted of a felony. Had the trial court allowed petitioner's requested instruction requiring knowledge that the gun was a "firearm" as defined by the Act, he may have been acquitted.

The *Staples* decision reaffirms that the Tenth Circuit falls within those circuit courts which hold that violations of 26 U.S.C. § 5861(d) are strict liability felony crimes.

While in *Mittleider, supra,* it would have made no difference in the outcome had the jury been instructed that the government must prove knowledge of the defendant of the automatic capability of the rifle, because Mittleider admitted that he knew the gun would fire automatically, here petitioner denied such knowledge. This factual distinction made no difference to the court of appeals below:

> Staples attempts to avoid *Mittleider* by labeling this and other critical language as "dicta" since this Court concluded from its review of the record that the defendant also had actual knowledge that the firearm had been converted into an automatic weapon. We are not persuaded. The court's reference to the defendant's knowledge was simply an additional reason supporting the conviction. *It did not diminish the force of the independent conclusion that actual knowledge is not an element of the offense.* [Emphasis added.] *Staples,* 971 F.2d at 612, 613.

In the circuits adopting the strict liability standard, including the Tenth Circuit, persons knowing they possess a firearm but not knowing the firearm has been modified in such a way as to become a "firearm" within the meaning of the Act are at risk of a felony conviction, while such persons in circuits requiring knowledge, like the Fifth Circuit, are not. Here, there was substantial evidence that petitioner lacked the knowledge that the AR-15 in question was a "firearm" under the Act, evidence which the jury certainly disregarded given the trial court's instructions quoted above.

CONCLUSION

This Honorable Court is respectfully petitioned to resolve the conflict between the United States Courts of Appeals over the issue of scienter as an element of the offense for the government to secure a conviction for knowing possession of an unregistered "firearm," by adopting a rule, consistent with *International Minerals,* requiring proof that the defendant knew that he possessed a "firearm" as that term is defined in the National Firearms Act. The Court is further requested to find that the trial court's instructions on the issue of scienter were erroneous and that the petitioner's conviction must be reversed.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HAROLD E. STAPLES, Defendant-Appellant.	)	No. 91-5033 (Filed Aug. 3, 1992)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. NO. 90-CR-75-C)

Susan W. Pennington, Assistant United States Attorney (Tony M. Graham, United States Attorney and Neal B. Kirkpatrick, Assistant United States Attorney, with her on the brief), for Plaintiff-Appellee.

Clark O. Brewster of Brewster and Shallcross, (Jennifer L. DeAngelis with him on the brief), Tulsa, Oklahoma, for Defendant-Appellant.

Before **ANDERSON** and EBEL, Circuit Judges, and **ANDERSON,*** District Judge.

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* The Honorable Aldon J. Anderson, Senior Judge, United States District Court for the District of Utah, sitting by designation.

ANDERSON, Circuit Judge.

Harold E. Staples, III, appeals from his conviction on one count of unlawful possession of an unregistered machine gun in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. Staples contends that the district court erred: (1) by failing to instruct the jury that scienter is an element of unlawful possession under 26 U.S.C. § 5861; (2) by excluding certain documentary evidence under Fed. R. Evid. 401; and (3) by refusing to submit to the jury his proffered instruction on the word "automatically" as it is used in 26 U.S.C. § 5845(b). On its own motion, the court has also raised the issue of the constitutionality of § 5861(d) as a result of our recent opinion in *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992). For the reasons stated below, we affirm.

BACKGROUND

On December 29, 1989, members of the police department of Jenks, Oklahoma, and the Bureau of Alcohol, Tobacco, and Firearms (BATF) conducted a search of Staples' home pursuant to a warrant. Among the items seized was an SGW .223 caliber Model X M14Al assault rifle ("AR-15"), which Staples had purchased on April 9, 1983. Appellant's App. Vol. I at 185, Tab K. There is no dispute that the AR-15 had never been registered to Staples under the National Firearms Act (NFA), 26 U.S.C. § 5841, as a registerable automatic weapon.

At the time of the search, the AR-15 contained neither a bolt carrier nor a magazine. Numerous weapons parts were found in the room where the AR-15 was stored including the bolt carrier for an M-16 military rifle. The M-16 bolt carrier was discovered in the pocket of a briefcase located in the room.

BATF agents examined the AR-15 in their Washington, D.C., laboratory. The examination showed that the AR-15 had been assembled with certain internal parts originally manufactured for fully automatic military rifles like the M-16 including the hammer, disconnector, and trigger. The weapon did not, however, have an auto-sear. The sole function of that part is to permit automatic fire. The gun had a three-position selector switch. BATF Agent Joseph McLaughlin testified at trial that an external pin or "stop" on the side of the weapon's receiver had been removed by filing. This external modification enabled a user of the weapon to rotate the selector switch to the full automatic position.

When the BATF agents cleaned and oiled the AR-15, inserted an appropriate magazine, used the M-16 bolt carrier found in the same room as the AR-15, loaded the weapon with "soft-primer" ammunition, and rotated the selector switch to full automatic, the weapon fired more than one shot with a single pull of the trigger.

After a two-day trial, the jury found Staples guilty of possession of the unregistered AR-15 while acquitting him on a separate count of possessing an unregistered M-1 rifle also found in the search. Staples filed motions for acquittal at the end of the government's case and following the verdict. Both were denied. Consistent with

the federal sentencing guidelines, the court sentenced Staples to five years probation with certain conditions, a $5,000 fine, and a $50 special assessment. The sentence has been stayed pending the outcome of this appeal.

DISCUSSION

I. CONSTITUTIONALITY OF STAPLES' CONVICTION UNDER 26 U.S.C. § 5861(d)

In *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), an opinion issued during the pendency of this appeal, we held a prosecution under § 5861(d) to be unconstitutional because that statute required the registration of a firearm which the government refused to register due to the ban on machineguns imposed after May 19, 1986 by 18 U.S.C. § 922(o).[1] Summarizing our position, we stated:

> Dalton was found guilty of possessing and transferring an unregistered firearm in violation of the National Firearms Act, I.R.C. §§ 5861(d),(e) (NFA). A separate criminal statute prohibits the possession of *any* machinegun made after that statute's effective date in 1986. 18 U.S.C. § 922(o) (1988). It is undisputed that the government will not permit the registration of machineguns covered by section 922(o), and will not accept the tax which would otherwise be required by the registration requirements of the National Firearms Act. Dalton contends that due process bars his conviction under a statute which punishes his failure to register when that registration is precluded by law. We agree and reverse.
>
> . . . .
>
> As a result of section 922(o), compliance with section 5861 is impossible.

Dalton, 960 F.2d at 122, 126.

[1] 18 U.S.C. § 922(o) provides in pertinent part:

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to –

. . .

(B) *any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.*

18 U.S.C. § 922(o) (emphasis added). "The date this subsection takes effect" for § 922(o)(2)(B) is May 19, 1986. *See* Pub.L. 99-308, § 110(c).

Because of the general similarity of the prosecution in this case with *Dalton*, and the fundamental nature of the issue involved, we raised the constitutional issue and permitted supplemental briefing by the parties. Since this is a potentially controlling issue, we address it first, applying the plain error standard of review.

After reviewing the record and arguments of the parties, we conclude that *Dalton* is distinguishable. *Dalton* concerned a weapon that was possessed for the first time in 1989, three years after the May 19, 1986, effective date of 18 U.S.C. § 922(o); whereas the gun in this case was purchased in 1983. Section 922(o)(2)(B) specifically exempts machineguns which were lawfully possessed (i.e., registered) prior to May 19, 1986. There is no dispute that machineguns *could* be registered prior to that date; thus, the reasoning in *Dalton* does not apply to the charge against Staples.

Neither of the parties address this distinction. The government contends mainly that *Dalton* is in error. Appellee's Suppl. Br. at 6. However, even if *Dalton* applied to this case we could not overrule a previous opinion of this court. *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990). En route to its conclusion, the government argues that § 5861(d) remains valid after *Dalton* because there are reasons the court did not cite to support upholding the provision, including Congress' power to regulate the interstate movement of machineguns pursuant to the Commerce Clause. Appellee's Suppl. Br. at 3, 5.

These arguments completely ignore the issue here – the requirement and date of registration of Staples' AR-15. Our statement in *Dalton* that since 1986 the government has refused to register machineguns (apparently for *any* reason, whether regulatory or revenue), was confirmed by testimony in this case by the government's witness, BATF Agent McLaughlin. He testified that the government would not register machineguns after the May 19, 1986 effective date of § 922(o).[2]

---

[2] Q: So, the day before his house was searched, he couldn't have even registered the gun then?
A: No, sir.
Q: The gun wasn't registerable by him, was it?
A: No, sir.
Q: . . . The day before anything ever happened, he couldn't have complied with the law if he wanted to, could he?
A: No, because the law was amended on May 1986 which forbade the private ownership of newly manufactured machine guns to civilians.
Q: If he owned the gun prior to 1986 and it fired in semi-automatic fashion but owned it after that act

Likewise, Staples' arguments miss the point. He merely "adopts Dalton's argument *in toto* that due process bars his conviction under a statute which punishes his failure to register when that registration is precluded by law." Appellant's Suppl. Br. at 7-8.

Staples does not, and, as explained above, cannot, argue that *Dalton* calls into question the validity of the nexus between § 922(o) and 26 U.S.C. § 5861(d) for any time *prior* to May 19, 1986.

His basic defense at trial was not that he could not register a machinegun, but that his weapon was not a machinegun under 26 U.S.C. § 5845 and, thus, was not subject to registration under the NFA. Alternatively, he contended that if his weapon was a machinegun, he did not know it; therefore, he lacked the requisite scienter to violate the registration requirement. *See* Reply Br. at 14-15. Staples had ample opportunity at trial to demonstrate that he

---

that you're talking about, how could – he couldn't register it, could he?
A: Well, something obviously happened to the weapon from the time that he owned it until the time it was seized. Because if it was semiautomatic before May 16th, 1986, there would have been no need to register it because it was a legal legitimate firearm.
Q: He could have lawfully possessed it prior to the act taking effect?
A: Certainly. As long as it didn't function automatically, no problem.
Q: But if it then functioned automatically through this hammer follow down concept after 1986, he couldn't register it, could he?
A: No. Because at that point, sir, it was contraband.
Appellant's App. Vol. II at 350-52, Tab Q.

complied with the registration provisions of the NFA prior to May 19, 1986, or that the weapon was converted into a machinegun after that date, but failed to do so.[3]

---

[3] The district court clearly understood this point as is obvious in its colloquy with Assistant United States Attorney Neal Kirkpatrick at a motions hearing only four days before the trial:

> THE COURT: *You would agree that the issue of when the stop was taken off the gun is a fact that goes to the jury, don't you.*
>
> MR. KIRKPATRICK: *They can argue it if they want.*
>
> *THE COURT: If the stop was there at the time the gun was in the possession of the defendant it was not an automatic weapon.*
>
> MR. KIRKPATRICK: *I would agree, yes, sir.*
>
> THE COURT: All right. All right.
>
> . . . .
>
> THE COURT: [S]uppose Mr. Gilbert with Mr. Brewster looking over his shoulder finds that there is a regulation in effect that would prohibit the registering of this gun.
>
> MR. KIRKPATRICK: Judge, that does not relieve us of the question, *whether or not in fact when the nipple was filed off the side of the receiver. And there is still a question of fact the jury can decide.* The case should not be continued. It has been continued.
>
> THE COURT: *I think what you're telling me is. then, the sole issue is when was the nipple filed off.*
>
> MR. KIRKPATRICK: *Yeah,* the defendants –
>
> THE COURT: *Because if it was filled* [sic] *off and in the possession of the defendant it makes no difference whether he can register it, because it obviously becomes registerable; is that right?*
>
> MR. KIRKPATRICK: *Yes, sir.*
>
> THE COURT: *So, one of the issues the Court should probably submit to the jury is a finding as to whether the nipple was there such that it could not be placed in automatic while it was in the possession of the defendant.*

Appellant's App. Vol. I at 160, 163-64, Tab J (emphasis added).

Staples, however, failed to pursue this argument at any point during the trial. Instead, he waited until the filing of his reply brief to attempt to argue that the government "did not establish when the stop was filed off." Reply Br. at 3. As the court correctly observed in the above-quoted colloquy, that was a question of fact that Staples properly should have presented to the jury.

II. SCIENTER UNDER 26 U.S.C. § 5861

Staples asserts that the district court failed to instruct the jury properly on the elements necessary to secure a conviction under § 5861 of the National Firearms Act.[4] The court instructed the jury as follows:

> Essential Elements of the Crime (26 U.S.C. § 5861(d))
>
> In order to establish the offense charged in the indictment, each of the following essential elements must be proved beyond a reasonable doubt:
>
> First: that the defendant knowingly possessed the firearm described in the Indictment; and
>
> Second: that such firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.
>
> The unlawful offense is complete when the two separate elements just stated are proved.

---

[4] This section makes it unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 28 U.S.C. § 5861.

Appellant's App. Vol. I at 21, Tab D.

Knowingly to Possess

> A person is knowingly in possession if his possession occurs voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted of possession of a firearm if he did not intend to possess it.
>
> The Government *need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril.*

Appellant's App. Vol. I at 25, Tab D (emphasis added).

Mere Possession of Unregistered Firearm

> Mere possession of an unregistered firearm is a violation of the law of the United States. *It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed it.*

Appellant's App. Vol. I at 26, Tab D (emphasis added). Staples contends that these instructions violate due process in that a jury could find him guilty of the offense charged without his having had any knowledge that he possessed a weapon subject to registration. Specifically, Staples argues that "scienter," "actual knowledge," or

"specific intent"[5] is a requisite element of the offense of § 5861.[6]

The threshold question is whether, as the district court concluded, our decision in *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988), controls the disposition of this issue. In *Mittleider*, we upheld a jury instruction substantively identical to the instructions challenged here,[7] stating that "[w]e are in accord with the rule adopted by the Fourth Circuit in [*United States v. Shilling*, 826 F.2d 1365, 1368 (4th Cir. 1987),] that the government is not required to prove actual knowledge of a weapon's physical properties." 835 F.2d at 774.

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[5] Staples uses these terms interchangeably in discussing what he perceives the mens rea requirement should be under the statute. Each envisions a specific intent type of standard to which a mistake of fact defense could be raised.

[6] Staples preserved this issue by timely objection and proffering the following instruction: "[a]n essential element of the offense of possessing a machine gun, is that the possessor knew that the gun would fire fully automatically and the burden is upon the Plaintiff to prove that specific knowledge." Appellant's App. Vol. I at 42, Tab E.

[7] The jury instruction in *Mittleider* read: "The mere possession of a firearm which is required to be registered and has not been registered is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon in his possession was a machine gun within the meaning of the statute or that he knew that registration was required. It is sufficient if you find beyond a reasonable doubt that he knowingly possessed it." 835 F.2d at 774. That instruction was based upon 2 E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions*, § 59.04 (3d Ed. 1977).

Staples attempts to avoid *Mittleider* by labeling this and other critical language as "dicta" since the court concluded from its review of the record that the defendant also had actual knowledge that the firearm had been converted into an automatic weapon. We are not persuaded. The court's reference to the defendant's knowledge was simply an additional reason supporting the conviction. It did not diminish the force of the independent conclusion that actual knowledge is not an element of the offense. This is apparent in the next section of the opinion in which the court states:

> In a related argument, defendant next claims there was insufficient evidence to show that he had actual knowledge that the J-15 firearm was an automatic weapon. His claim is premised on the *implicit, and unsupported, assumption* that the government was *required to prove that he knew* that the weapon was automatic. *As discussed above, that assumption is unfounded. See United States v. Shilling*, 826 F.2d at 1367-68; *Morgan v. United States*, 564 F.2d at 805-06.

Mittleider, 835 F.2d at 774-75 (emphasis added).

Staples also seeks to escape the clear command of *Mittleider* by claiming that his case is distinguishable on the facts. Staples asserts that *Mittleider* addressed a situation where a firearm contained external modifications while, in his own case, the weapon had only internal modifications. We do not read the record similarly. The uncontested testimony at trial by BATF Agents Ward and McLaughlin was that the weapon's selector switch, located on the exterior of the receiver, could be turned to the automatic fire position and that there was a shiny

spot on the receiver indicative of tampering. *See* Appellant's App. Vol. II at 286, 291, Tab Q; Appellee's Suppl. App. at 16-17. Since the weapon contained external modifications, there is no basis to distinguish this case from *Mittleider*.[8]

We conclude that *Mittleider* controls this case and that the trial court properly instructed the jury on the substantive elements necessary for conviction under § 5861(d). Staples essentially concedes the inescapability of this conclusion by asking us to "reverse" *Mittleider*, Appellants Reply Br. at 15, which, of course, we are powerless to do even if so inclined. *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990) (a three-judge panel may not overrule a previous opinion of this court).

III. ADMISSIBILITY OF CERTAIN EXHIBITS

Staples next argues that the district court erred by excluding certain documents that he obtained through discovery from BATF and sought to introduce as evidence at trial. These documents were: Defendant's Exhibit 4, an unpublished internal BATF memorandum concerning

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[8] We note that the circuits have diverged on the issue of whether actual knowledge is an element under § 5861(d). *Compare United States v. Ross*, 917 F.2d 997 (7th Cir. 1990); *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987) (knowledge not required that weapon is subject to NFA) *with United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) (en banc); *United States v. Williams*, 872 F.2d 773 (6th Cir. 1989) (need "mens rea" or knowledge that weapon is covered by the NFA for § 5861 conviction). Even those circuits that diverge from *Mittleider* do so in light of different factual situations. In both *Williams* and *Anderson*, the weapons at issue had no external modifications.

AR-15's manufactured with M-16 parts; Defendant's Exhibit 8, a letter discussing AR-15's with installed M-16 parts, sent by BATF in response to a constituent inquiry to Senator Mark Hatfield's office; Defendant's Exhibits 9, 10, 13, and 14 discussing the registrability of an auto sear; Defendant's Exhibit 15, a BATF letter to a gun manufacturer discussing AR-15's and auto sears; and Defendant's Exhibit 5, an internal BATF report from 1967 concerning the test-fire of a particular AR-15 Sporter gun.

Staples argues variously that these exhibits either establish or tend to show that: (1) absent an auto sear, an AR-15 does not need to be registered under the NFA, Appellant's Principal Br. at 23; (2) an AR-15 without an auto sear could not be registered pursuant to 18 U.S.C. § 922(o); (3) his weapon was not registerable, *id.*; (4) BATF knew that an AR-15 with M-16 parts could malfunction to fire more than one shot with a single pull of the trigger, *id.* at 27; (5) although BATF knew about the possibility of malfunction, it did not notify gun owners of this situation, *id.* at 2629; (6) Staples had no personal notice of this "malfunction" condition known as "hammer-follow-down"; (7) his weapon is not a machine gun except by malfunction; (8) notice of registrability is an element of the crime of possession; and (9) that it was fundamentally unfair, amounting to a deprivation of due process, for the government to have prosecuted him when the government knew that this type of weapon could malfunction to fire automatically but did not publish a warning to gun owners alerting them of this problem.

The district court sustained objections to the admissibility of the documents, primarily on the grounds of

relevance. The court did allow Staples to use the documents during cross-examination, and to place his position before the jury.

A district court is granted broad discretion in determining the relevancy of evidence. *United States v. Alexander,* 849 F.2d 1293, 1301 (10th Cir. 1988). We review a trial court's decision to admit or exclude a given piece of evidence under an abuse of discretion standard. *Id.* (citations omitted).

Fed. R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

As explained below, the proffered documents had no tendency to establish any fact of consequence to the determination of this action. The offense charged is possession of a machine gun, defined in § 5845(b) as *"any* weapon which shoots . . . automatically more than one shot . . . by a single function of the trigger." 26 U.S.C. § 5845(b) (emphasis added). The exhibits bore no direct relationship to any of the elements of the offense charged, making it more probable or less probable that *this* AR-15 with M-16 parts, having had its selector switch filed off, constituted a firearm subject to registration under the NFA.

Staples argues that an AR-15 without an auto sear is not a machine gun as defined under § 5845(b) and so does not have to be registered under the NFA. It is undisputed that weapons defined as "firearms" under § 5845 must be registered while weapons outside the definition need not

be registered. It is also true that auto sears must be registered under the NFA.[9]

Staples attempts to deduce from this that "[t]he implication is, of course, that absent an auto sear, the AR-15 with M-16 internal components is not a National Firearms Act weapon and thus, not registerable." Appellant's Principal Br. at 29. The district court refused to accept the implication that Staples advanced. The court noted variously: "Show me the regulation that says that you [can] not register a fully automatic AR-15 that doesn't have a sear." Appellant's App. Vol. II at 433, Tab S.

> [I]f this man is charged, and I haven't heard it, with failure to register an auto sear, or an auto sear is some way involved in this case involving the registration, then I'll let you use it. . . . But the mere fact they've said that an auto sear must be registered and is an automatic weapon under the statute doesn't mean that nothing else is.

Id. at 467. We agree. The fact that an auto sear requires registration does not mean that all weapons which do not have auto sears are exempt from registration. The question is whether Staples' sear-less AR-15 could fire automatically. Automatic weapons must be registered. Defendant's Exhibits 9, 10, 13, 14, and 15 were not germane to any issue in the case, and it was not an abuse of discretion to exclude their admission.

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[9] *See* Appellant's Reply Br. at 9; BATF Ruling 81-4; 27 C.F.R. § 179.11. *But see United States v. Sullivan*, 919 F.2d 1403, 1412 n. 8 (10th Cir. 1990) (court observed that an AR-15 could be modified to fire fully automatic even without an auto sear).

In a related argument, Staples contends that his weapon was malfunctioning causing it to fire automatically more than one shot with a single pull of the trigger. In other words, if the weapon was a machine gun, it was so wholly by accident. He asserts that a weapon malfunctioning because of hammer-follow-down cannot constitute a firearm under the NFA and so does not have to be registered. We do not need to reach the broader question of whether a weapon that malfunctions can constitute a firearm under the NFA.

Staples pursued his malfunction argument vigorously at trial both on direct and cross-examination. He testified himself, and elicited testimony from multiple witnesses, that his AR-15 had never fired more than one round with a single pull of the trigger. The government challenged that theory as part of its proof in support of the charge. The jury examined the weapon and saw videotapes of the weapon being fired. Thus it was able to evaluate Staples' weapon and make an independent judgment as to its capabilities.

Staples next asserts that his conviction cannot stand because he had no notice that his weapon needed to be registered. This argument embraces two assertions: (1) that knowledge of registrability is an element of the offense; and (2) that a governmental agency has an affirmative duty to notify the public of what actions constitute a violation in the view of the agency.

Mittleider rejects the position that knowledge of registrability constitutes an element of the offense. The government is not required to prove that a defendant knows "that registration of the weapon was required." 835 F.2d

at 774; *see also United States v. Freed*, 401 U.S. 601, 607 (1971). Since neither knowledge nor notice of registrability is an element of the offense, it was not an abuse of discretion for the district court to find that documents discussing this point were irrelevant. Furthermore, the statutes themselves are the source of notice, and they are clear on the subject.

For these and other reasons, Staples' other assertion is equally unavailing. BATF's regulatory silence does not necessarily imply that his weapon was not subject to registration. *See* Appellant's Principal Br. at 27.

The district court aptly made that point stating:

> Your next question has dealt with the other five M-16 parts, whether they were registerable. Now, as I said at the bench, if this expert [Agent McLaughlin] can testify that the mere possession of the five parts together with an AR-15 gun constitutes a failure to register, then you would be permitted to put in anything where they have ruled that it's a non-registerable item. The facts of this case though are that there is a gun in being, there are installed parts . . . that by reason of the manner in which the installation has actually occurred, that it shoots fully automatic and therefore falls within the definition of a machine gun.
>
> *Now, I will tell you once again, if you have got anything that is relative to this case, that where a gun with these installed parts that shoots fully automatic is not registerable, I will let you get into it.*

Appellant's App. Vol. II at 427, Tab S (emphasis added). Staples did not pursue the district court's offer and has cited no case, statute, or BATF regulation to support his

contention that the AR-15, as modified, was not subject to registration, or could not be registered under the NFA. Even if BATF ruled that a generic AR-15 with M-16 parts did or did not constitute a firearm requiring registration under the NFA, such a general ruling would not determine the issue of the registrability of Staples' gun as a matter of law. Staples does not discuss, for instance, weapons where the selector switch has been externally modified by filing to allow the weapon to fire automatically instead of just semiautomatically; and he does not discuss the impact of the statute on specific weapons which, however configured generally, operate in fact as a machine gun.[10]

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[10] Staples' citation of Defendant's Exhibit 4, a March 11, 1986 BATF memorandum is unhelpful. In the memorandum to the file, the author noted:

> The proposed draft ruling would hold that an AR15 type rifle in combination with an M16 hammer, trigger, disconnector, selector and bolt carrier is a combination of parts from which a machine gun can be assembled and is a machine gun if such rifle and parts are in the possession or under control of a person. It would also hold that an AR15 type rifle in combination with any M16 part or parts (whether assembled or unassembled) which, when assembled, shoots automatically by manipulation of the selector or removal of the disconnector is also a machine gun.
>
> *The Bureau has determined not to issue the ruling at this time. . . .*

Appellant's App. Vol. I at 45, Tab F.

Staples concludes that the non-issuance of an unpublished, internal BATF ruling implies that his weapon is exempt from the NFA. He cites no authority to support this novel proposition.

Staples' final contention is that these exhibits prove it was fundamentally unfair for the government to prosecute him. The unfairness of the prosecution is based on two grounds: (1) that the government knew that weapons of this type could malfunction yet concealed that fact from gun owners; and (2) that Staples' gun was unregisterable as a matter of law. Both points are disposed of by our discussion above.[11]

In sum, exclusion of the proffered exhibits did not constitute reversible error.

IV. "AUTOMATICALLY" UNDER 26 U.S.C. § 5845

Staples' final argument is that the district court erred when it refused to give his tendered instruction on the word "automatically" as used in § 5845(b).

Section 5845(b) defines "machine gun" in relevant part as:

> *any weapon which shoots*, is designed to shoot, or can be readily restored to shoot, *automatically more than one shot, without manual reloading, by a single function of the trigger.* The term shall also include . . . any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (emphasis added).

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[11] The testimony by Agent McLaughlin, set out in n.2, cited by Staples in support of the proposition that *his* weapon was unregisterable, neither stands for that proposition nor, more to the point, compelled the admission of the exhibits in question.

The district court instructed the jury in these terms, and refused the following instructions proffered by Staples.

AUTOMATIC – DEFINED

> By automatic is meant self-acting, or the elimination of human agency or volition which results in the saving of labor and increased certainty and uniformity of operation. Citing *Tripp Giant Leveler Co. v. Rogers*, 61 F. 289, 290-91 (D. Mass. 1894).

AUTOMATICALLY – DEFINED

> The word "automatically," as applied to a mechanism, is in common use and is unambiguous. It means "self-acting," and it implies a certain cycle of movements which the machine itself makes without outside control. . . . In the development of many machines there can be traced a constantly increasing extent of automatism; by which is meant that many steps or processes, which formerly had to be started, stopped, or controlled by the operative, are now started, stopped, or controlled by the machine itself. Citing *American Roll Gold Leaf Co. v. W.H. Coe Mfg. Co.*, 212 F. 720, 724 (1st Cir. 1914).

Appellant's Principal Br. at 35.

Staples asserts that his instructions properly inject concepts of "reliability" and "lack of human agency" into the definition of "automatically." Appellant's Principal Br. at 36. He also repeats his argument that knowledge is a necessary element to be proved by the government – in

this instance, knowledge of possession of a weapon which reliably fires automatically. *Id.* at 38.

Staples bases his reliability and lack of human agency argument on authority from a 1914 case out of the First circuit and an 1894 district court opinion. He concedes that "[t]hey were patent cases, but they weren't firearm cases." Appellant's App. Vol. II at 488, Tab T. He does not cite and this court can not find any authority for employing the definition of automatically that he commends to us in the context of the National Firearms Act.

This Court must determine whether in light of the record as a whole the jury instructions as given correctly stated the applicable law and provided the jury with adequate understanding of the issues involved in the case. *United States v. Agnew*, 931 F.2d 1397, 1410 (10th Cir. 1991); *United States v. Willis*, 890 F.2d 1099, 1104 (10th Cir. 1989). We are satisfied that this standard was met by the court's instructions.

We have examined all of Staples' arguments, addressing those deemed appropriate, and we find no reversible error in the proceedings below. Accordingly, the judgment of conviction is AFFIRMED.

No. 91-5033 – U.S. v. Staples.

EBEL, Circuit Judge, concurring.

I concur in the result of the majority opinion in this case because I agree that this panel is bound by our precedent in *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988). I write separately because in my view the growing trend in the law is to require the government to prove knowledge of the

characteristics of the weapon that make its possession a crime.

Like the instant case, *Mittleider* dealt with possession of an unregistered automatic weapon. In *Mittleider*, we held that the government need only prove that the defendant knowingly possessed a *gun* and need not "prove actual knowledge of a weapon's physical properties" to convict under the National Firearms Act ("NFA"). *Id.* at 774. In *Mittleider*, however, the defendant "had actual knowledge that [the rifle] had been converted into an automatic weapon," *id.*, and thus the government's lessened burden of proof did not lead to an unjust result in that case.

In cases in which the defendant is truly ignorant of the automatic characteristics of the gun, on the other hand, the law as construed in *Mittleider* may lead to draconian results. Consider, for example, a situation in which a person who knows nothing about guns inherits a rifle from a relative. Unbeknownst to the recipient, the gun is defective and occasionally discharges two rounds of ammunition after a single pull of the trigger, or perhaps it has been converted by a prior owner into an automatic weapon. Because he has no use for the rifle, the recipient stores it with other unnecessary possessions in his basement or attic without having ever used it or indeed even examined it. Under *Mittleider*, that person may be prosecuted and convicted for violation of 26 U.S.C. § 5861 and may receive a sentence of twenty-seven to thirty-three months' imprisonment. *See* U.S.S.G. § 2K2.1(a)(5).

Whether the appellant in the instant case is such an innocent victim is an open question because the jury was precluded from considering his knowledge of the gun's capabilities. Principles of justice and fair play suggest that we ought to overturn *Mittleider* and let the jury decide whether the defendant knowingly possessed an *automatic* weapon.

I start with the basic premise that strict liability is disfavored and generally should be reserved for less serious crimes in which the potential punishment is not severe. Congress' mere failure specifically to include an intent requirement when defining an offense is not adequate by itself to indicate Congress' desire to depart from the normal assumption in criminal law that scienter is a necessary part of the offense. *See Liparota v. United States*, 471 U.S. 419, 426 (1985) ("criminal offenses requiring no *mens rea* have a 'generally disfavored status' ") (citation omitted); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) ("far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement"); *Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.") (footnote omitted); Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* §3.8(c), at 248 (2d ed. 1986). Against this backdrop, I look to the law.

As I read the case law, four circuits, including our own, have held that a defendant is strictly liable for possession of an automatic weapon even though the defendant did not know the automatic characteristics of the weapon. In other words, the defendant need not know that the gun can fire more than one round after a single pull of the trigger. *See United States v. Ross*, 917 F.2d 997, 999-1001 (7th Cir. 1990) (per curiam), *cert. denied*, 111 S. Ct. 1078 (1991); *Mittleider*, 835 F.2d at 774; *United States v. Shilling*, 826 F.2d 1365, 1367-68 (4th Cir. 1987) (per curiam), *cert. denied*, 484 U.S. 1043 (1988); *Morgan v. United States*, 564 F.2d 803, 805-06 (8th Cir. 1977) (per curiam).

On the other hand, six circuits have rejected strict liability to varying degrees, holding that the individual must have actual or constructive knowledge that the weapon was not an ordinary gun. *See United States v. Harris*, 959 F.2d 246, 257-61 (D.C. Cir. 1992) ("We believe that if Congress, against the background of widespread lawful gun ownership, wished to criminalize the mere unregistered possession of certain types of firearms – often indistinguishable from other, non-prohibited types – it would have spoken clearly to that effect. . . . Because the jury was not charged that it had to find that [appellants] knew they were receiving a proscribed firearm (machine gun) . . . , appellants' convictions . . . must be reversed."), *petition for cert. filed* (May 7, 1992) (No. 91-8167) *and petition for cert. filed* (May 19, 1992) (No. 91-8328); *United States v. Kindred*, 931 F.2d 609, 612 (9th Cir. 1991) ("[T]he district court erred by instructing that the government need only prove that the defendant knew that the object was a gun. To secure a conviction under

the act, the government must prove that the defendant knew that he possessed a dangerous device of a type that would alert one to the likelihood of regulation."); *United States v. Anderson*, 885 F.2d 1248, 1254-55 (5th Cir. 1989) (en banc) ("We think it far too severe for our community to bear – and plainly not intended by Congress – to subject to ten years' imprisonment one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol merely because it has been, unknown to him, modified to be fully automatic."); *United States v. Williams*, 872 F.2d 773, 777 (6th Cir. 1989) ("the government was required to prove defendants' knowledge of the weapon's automatic quality" because strict liability for a felony may offend due process); *United States v. Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983) ("There are two elements the government had to prove . . . to sustain a conviction under Section 5861(d): (1) that [the defendant] . . . *knowingly possessed an automatic weapon*, and (2) that the automatic weapon was not . . . registered. . . . ") (emphasis added), *cert. denied*, 465 U.S. 1037 (1984);[1] *United States v. DeBartolo*, 482 F.2d

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[1] Several cases cite *Gonzalez* as support for the strict liability view. *See, e.g., Harris*, 959 F.2d at 260; *Williams*, 872 F.2d at 775. In *Gonzalez*, the defendant made no contention that he believed the machinegun to be an ordinary gun. The court held that the government must prove that the defendant "knowingly possessed an automatic weapon," but that the government need not "prove that the defendant knew that the weapon in his possession was a 'firearm' within the meaning of the statute. . . . There is no scienter required to be proven." *Gonzalez*, 719 F.2d at 1522. The court in *Gonzalez* cited *United States v. Cheramie*, 520 F.2d 325, 329 (5th Cir. 1975), which approved a jury instruction stating that "for purposes of [26 U.S.C. § 5861] the defendant's

312, 316 (1st Cir. 1973) ("The Government need not prove that a defendant knows he is dealing with . . . a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with *a dangerous device of such type as would alert one to the likelihood of regulation.*") (emphasis added).[2]

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knowledge that his acts violated the law is not a prerequisite to a guilty verdict." I read *Gonzalez* to mean that the government must prove that the defendant knew the weapon was automatic but need not prove that the defendant knew that such a weapon was illegal under the statute. This states no more than that ignorance of the law is no excuse, but ignorance of fact is an excuse if it deprives the actor of the requisite intent. *See* discussion of this distinction *infra*.

[2] Several courts have also cited *DeBartolo* as a case supporting strict liability for possession of an automatic weapon. *See, e.g., Harris*, 959 F.2d at 260; *Williams*, 872 F.2d at 775. However, while this case does not go as far as the D.C. Circuit, Sixth Circuit, and Fifth Circuit in holding that the government must prove actual knowledge of the characteristics that render the weapon a "firearm" within the meaning of the statute, it does require, like the Ninth Circuit, that the government prove knowledge that the weapon is "a dangerous device of such type as would alert one to the likelihood of regulation." *DeBartolo*, 482 F.2d at 316; *see Kindred*, 931 F.2d at 612; *United States v. Herbert*, 698 F.2d 981, 986 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983). In contrast, the strict liability circuits have held that the government need only prove that the defendant knew the item in question was a firearm in the ordinary sense, i.e., a gun. *See Ross*, 917 F.2d at 999; *Mittleider*, 835 F.2d at 774; *Shilling*, 826 F.2d at 1368; *Morgan*, 564 F.2d at 805. The First Circuit in *DeBartolo* held that a *shotgun* was a sufficiently dangerous device that it would put the owner on notice of the possible need for registration. Although I would not necessarily agree with that conclusion, here we are dealing with a rifle. As the Ninth Circuit has recognized explicitly, an ordinary firearm (such as a rifle) may not necessarily be a "dangerous device of such type as would

Moreover, of the last five circuits that have considered this issue, four have rejected strict liability for possession of an automatic weapon, which supports my view that

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alert one to the likelihood of regulation." *Kindred*, 931 F.2d at 612; *Herbert*, 698 F.2d at 986.

I note that the jury instruction in the instant case might arguably pass muster under the First and Ninth Circuits' approach, because it stated in part that "[t]he Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation." 1 Appellant's App., Tab D at 25. However, the court later instructed the jury that "[m]ere possession of an unregistered firearm is a violation of the law of the United States." *Id.*, Tab D at 26. This instruction seemingly contradicts the previous instruction and would appear to impose strict liability for possession of an unregistered firearm, even if it was not a "dangerous device of such type as would alert one to the likelihood of regulation." Because we cannot tell which instruction the jury followed, we must assume that it based its decision on the strict liability instruction. *Cf. Griffin v. United States*, 112 S. Ct. 466, 471 (1991) ("where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground"). Moreover, *Mittleider* does not require even the above instruction. It [sic] *Mittleider*, we approved the following instruction:

> The mere possession of a firearm which is required to be registered and has not been registered is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon in his possession was a machine gun within the meaning of the statute. . . . It is sufficient if you find beyond a reasonable doubt that he knowingly possessed it.

Mittleider, 835 F.2d at 774.

the trend is to reject the *Mittleider* view of strict liability under this statute.

There is some confusion in the above cases regarding the word *scienter*. Scienter under section 5861 requires that the defendant know of the *physical characteristics* of the gun that make it registerable. Scienter does not require that the defendant know that the *law* requires a gun with such characteristics to be registered, nor does it require that the defendant know that the gun is a "firearm" within the definition of the statute. In other words, ignorance of the law is no defense, but a mistake of fact is. By analogy, to be guilty of larceny, an individual need not know that the taking of the property of another is illegal, but he must know that the property he is taking belongs to another.

Similar reasoning applies in *United States v. Freed*, 401 U.S. 601 (1971), a case that every circuit, regardless of whether or not it favors strict liability, has cited in support of its resolution of the issue. In *Freed*, the Supreme Court held that the government need not prove that the defendant knew that hand grenades had to be registered or that his hand grenades were not registered. However, the Court did require the government to prove that the defendant had "knowledge that the instrument possessed was a firearm." *Id.* at 607. The statute defined "firearms" to include hand grenades, so presumably the government had to prove that the defendant knew the items in his possession were, in fact, hand grenades. *Id.* One must assume that if the defendant had believed the items were merely movie props simulating hand grenades, he would have lacked the requisite intent necessary for conviction. Similarly, automatic weapons (but not unmodified rifles)

are defined as "firearms" under the NFA. As I read *Freed*, the government must prove that the defendant "had knowledge that the instrument possessed was a firearm" – that is, that it was an automatic weapon. *Id.* If the defendant did not know he possessed a weapon that was capable of firing multiple times after a single pull of the trigger, then he did not know he possessed a "firearm." *Freed* requires at least that much knowledge or scienter before a defendant can be convicted under section 5861. The scienter rejected in *Freed* related to knowledge of regulation, not knowledge of the reality of what one possessed.

Although the defendant does not need to know the statutory definition of "firearm," the court must look to the statutory definition to see what physical items are described therein as requiring registration. The defendant must know that he possesses such a physical item. Here, although the statute uses the generic term "firearm," it defines that term as a term of art to exclude unmodified rifles, but to include automatic weapons. Thus, it is necessary to show that the defendant knew he possessed not simply an ordinary rifle, but one with the capability of firing multiple shots after a single pull of the trigger.

Were we not bound by precedent, I would have voted to reverse the appellant's conviction and to remand for a new trial. While there were some external signs that the gun in question had been modified, there was also some evidence that the appellant did not know of the gun's apparent automatic capabilities. Thus, whether the appellant did have such knowledge was a question for the jury, but the jury instructions in this case prevented the jury

from considering this question. It is not within our province to substitute our factfinding for that of the jury on this critical issue.

Thus, I concur in the result reached in the opinion. However, I would welcome the opportunity for our circuit to reexamine this issue if the appellant files a timely suggestion for rehearing en banc. *See* Fed. R. App. P. 35; 10th Cir. R. 35.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. HAROLD E. STAPLES, Defendant - Appellant.	)	No. 91-5033

JUDGMENT
Entered November 4, 1992

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and ANDERSON*, District Judge.

---

*The Honorable Aldon J. Anderson, Senior Judge, United States District Judge for the District of Utah, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who

are in regular active service. The court having polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Judges McKay, Seymour, and Ebel would grant rehearing.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher, Chief
Deputy Clerk

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 90-CR-75-C
HAROLD E. STAPLES, III, Defendant.	)	

ORDER

(Feb. 1, 1991)

Before the Court is the motion of the defendant to set aside verdict and enter judgment of acquittal, pursuant to Rule 29(c) F.R.Cr.P. Defendant was found guilty of a violation of 26 U.S.C. § 5861(d) on December 19, 1990.

The defendant's contentions regarding *scienter* are dealt with easily. The Court followed the holding of *United States v. Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988). A district court must follow the precedent of its circuit. *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990).

The defendant also argues that the firearm in question was malfunctioning and did not in fact fire more than one shot with a single trigger pull "automatically". In view of contrary evidence presented at trial by the government, the Court submitted these factual questions to the jury. Obviously, the jury was not persuaded. The Court, viewing the evidence in the light most favorable to the government, sees no basis for reversal. *See United States v. Peveto*, 881 F.2d 844, 860 (10th Cir.), *cert. denied*, 110 S.Ct. 348 (1989).

Next, defendant argues that ATF Ruling 81-4, which held that an AR-15 could be converted to a machinegun with the addition of the "auto sear" renders the present prosecution a violation of due process. He argues, in essence, that the agency should have published a supplement to Ruling 81-4 making clear that an AR-15 (*i.e.*, some AR-15 rifles with M-16 parts) could be considered a machinegun even without the auto sear.

The Court disagrees, based upon *United States v. Green*, 515 F.Supp. 517 (D.Md. 1981), the decision cited by defendant, and the cases cited therein. In *Green*, the court made clear that published ATF rulings, pursuant to 27 C.F.R. §71.41(d), merely provide precedent forATF decisions in other cases. They are not binding upon a court when they are contrary to the clear intent of Congress as expressed by the plain language of the statute. 515 F.Supp. at 520-21. Broad language in a criminal statute may have been enacted with a view that prosecutorial discretion will refrain from bringing indictments under certain facts. Whether this Court agrees with the exercise of that discretion is irrelevant. The Court has concluded that the prosecution in question falls within the language of the statute, and that the conviction should stand.[1]

---

[1] Defendant's citation of *York v. Secretary of the Treasury*, 774 F.2d 417 (10th Cir. 1985) is inapposite as it involved a civil proceeding. Deference to an agency interpretation is not implicated regarding criminal statutes *See Crandon v. United States*, 110 S.Ct. 997, 1011 (1990) (Scalia, J., concurring).

Finally, defendant argues for acquittal because he possessed the firearm before the effective date of 18 U.S.C. §922(o). Defendant was not charged with violation of this statute, and its application is irrelevant.

It is the Order of the Court that the motion of the defendant to set aside verdict and enter judgment of acquittal is hereby DENIED.

IT IS SO ORDERED this 1st day of February, 1991

/s/ H. Dale Cook
H. DALE COOK
Chief Judge,
U.S. District Court

UNITED STATES DISTRICT COURT

NORTHERN District of OKLAHOMA

UNITED STATES OF AMERICA V. Harold Edward Staples, III (Name of Defendant)	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987) Case Number: 90-CR-075-001-C Clark Brewster Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____ .

[x] was found guilty on count(s) One of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26:5861(d)	Possession of an Unregistered Firearm	12-29-89	One

United States District Court)
SS
Northern District of Oklahoma)

I hereby certify that the foregoing is a true copy of the original on file in this Court.

Jack C. Silver, Clerk

By Jack C. Silver
Deputy

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ _____ .

and is discharted as to such count(s).

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 50 , for count(s) One , which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
446-56-9981

Defendant's Date of Birth:
02-24-54

Defendant's Mailing Address:
1412 North Second Street
Jenks, Oklahoma 74037

Defendant's Residence Address:
Same as mailing

February 20, 1991
Date of Imposition of Sentence

/s/ H. Dale Cook
Signature of Judicial Officer
The Honorable
H. Dale Cook
Chief,
U.S. District Judge
Name & Title of Judicial Officer

_____
Date

PROBATION

The defendant is hereby placed on probation for a term of Five (5) years

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

(1) Dispose of all firearms.

(2) Pay $5,000 fine.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime in addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court of probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall submit to urinalysis as directed by the Probation Office.

FINE

The defendant shall pay a fine of $5,000. The fine includes any costs of incarceration and/or ~~supervision~~.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[xx] in full immediately.

[ ] in full not later than ___.

[ ] in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guidelines application in the presentence report.

OR

[XX] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The Court finds the defendant possessed the firearm in question for sporting purposes and reduces the offense level to 6 pursuant to 2K2.1(b)(1).

Guideline Range Determined by the Court:

Total Offense Level: 6

Criminal History Category: I

Imprisonment Range: 0 to 6 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 500 to $ 5,000

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $N/A

[ ] Full restitution is not ordered for the following reason(s):

[xx] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

STATUTES

18 U.S.C. § 922. Unlawful acts

(a) It shall be unlawful –

* * *

(*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to –

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

* * *

---

26 U.S.C. § 5845. Definitions

For the purpose of this chapter –

(a) Firearm. – The term "firearm" means . . . (6) a machinegun; . . . The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun. – The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

* * *

---

26 U.S.C. § 5861. Prohibited acts

It shall be unlawful for any person –

* * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

* * *

---

26 U.S.C. § 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.

Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

No. 92-1441

In the Supreme Court of the United States

OCTOBER TERM, 1992

HAROLD E. STAPLES, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
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14 pp

QUESTION PRESENTED

Whether the district court erred in instructing the jury that, in order to convict petitioner of a violation of 26 U.S.C. 5861(d), the government was required to prove only that petitioner knew the weapon he possessed was a dangerous device of the type that would alert one to the likelihood of regulation, and not that he knew it possessed all of the physical characteristics of a machine-gun.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1441

HAROLD E. STAPLES, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 971 F.2d 608. The opinion of the district court denying petitioner's motion to set aside the verdict (Pet. App. 34a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1992. A petition for rehearing was denied on November 4, 1992. Pet. App. 32a-33a. On January 22, 1993, Justice White granted petitioner an extension of time to and including March 4, 1993, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on one count of knowing possession of an unregistered machinegun, in violation of 26 U.S.C. 5861(d). He was sentenced to five years' probation and a $5,000 fine. The court of appeals affirmed. Pet. App. 1a-31a.

1. On December 29, 1989, petitioner's house was searched pursuant to a search warrant by agents of the Jenks, Oklahoma, Police Department, and the Bureau of Alcohol, Tobacco, and Firearms (BATF). The agents found an M-1 rifle, an AR-15 assault rifle lacking a magazine and a bolt carrier, a high-powered rifle scope, and numerous other weapons parts, including an M-16 bolt carrier. The AR-15 had never been registered to petitioner under the National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.* Pet. App. 2a-3a.

The AR-15 is the semi-automatic version of the military's M-16 automatic rifle; unless it has been altered, the AR-15 can fire only one shot with each pull of the trigger. Petitioner's AR-15, however, had been altered. It had been assembled with a hammer, disconnector, trigger, and selector switch from an M-16. A pin that normally prevents the AR-15's selector switch from being rotated to the fully automatic position had been filed away, leaving a shiny spot on the otherwise-black receiver. When BATF agents inserted the M-16 bolt carrier found with petitioner's AR-15, the weapon fired more than one shot with a single pull of the trigger. Pet. App. 2a-3a; Gov't C.A. Br. 4, 10.

2. The district court instructed the jury that, to establish that petitioner violated 26 U.S.C. 5861(d) by knowingly possessing an unregistered firearm,

> [t]he Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril.

Pet. App. 10a. The jury convicted petitioner of illegal possession of the weapon.

3. The court of appeals affirmed. The court followed circuit precedent that established that in order to obtain a conviction under 26 U.S.C. 5861, "the government is not required to prove actual knowledge of a weapon's physical properties"—specifically, that it is capable of automatic fire. Pet. App. 11a (quoting *United States* v. *Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988)).

DISCUSSION

1. Petitioner claims (Pet. 9-28) that 26 U.S.C. 5861(d) requires proof that he knew the AR-15 was a machinegun proscribed by the National Firearms Act, and not merely that he knew the weapon was a firearm in the ordinary sense of that term. The court of appeals correctly rejected that claim.

Under 26 U.S.C. 5861(d), it is "unlawful for any person * * * to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." The term "firearm" as used in the Act does not include a semi-automatic weapon, but does include a machinegun, which is defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger," or "any combination of parts from which a

machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. 5845(a)(6) and (b).

Following *United States* v. *Freed*, 401 U.S. 601 (1971), a majority of the circuits have held that knowledge of a weapon's specific characteristics is not an essential element of the crime described by Section 5861(d). In *Freed*, this Court reversed a district court's dismissal of an indictment under Section 5861, which charged the defendant with possession of unregistered hand grenades, "for absence of an allegation of scienter." 401 U.S. at 607. The Court held that the National Firearms Act required no specific intent or knowledge that the weapons in question were unregistered. Rather, the "only knowledge required to be proved was knowledge that the instrument possessed was a firearm." *Ibid.* The Court found that the imposition of criminal liability with only that element of scienter did not violate the Due Process Clause. As the Court explained, "[t]his is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609; see also *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971) (where "dangerous or deleterious devices * * * are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation").

Following that analysis, most courts have held that "the government does *not* have to prove that the defendant knew that the weapon in his possession was a 'firearm' within the meaning of the statute." *United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984). Accord *United States* v. *DeBartolo*, 482 F.2d 312, 316 (1st Cir. 1973); *United States* v. *Shilling*, 826 F.2d 1365, 1367-1368 (4th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); *United States* v. *Cowper*, 503 F.2d 130, 132-133 (6th Cir. 1974), cert. denied, 420 U.S. 930 (1975); *United States* v. *Ranney*, 524 F.2d 830, 832 (7th Cir. 1975), cert. denied, 424 U.S. 922 (1976); *United States* v. *Woodruff*, 600 F.2d 174, 176 (8th Cir. 1979); *Morgan* v. *United States*, 564 F.2d 803, 805 (8th Cir. 1977) (per curiam); *United States* v. *Thomas*, 531 F.2d 419, 420-422 (9th Cir.), cert. denied, 425 U.S. 996 (1976); *United States* v. *Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988).

In our brief in opposition in *Ross* v. *United States*, cert. denied, 498 U.S. 1122 (1991) (No. 90-6405), we acknowledged that some courts have recognized a narrow exception to the general rule that knowledge of a weapon's specific characteristics is not an essential element of the crime. At the time of *Ross*, the Fifth, Sixth, and Ninth Circuits had held that such knowledge is required when the statute is applied to weapons that appear on visual inspection to be semi-automatic, and thus not covered by the statute, although they have been internally modified to be fully automatic. See *United States* v. *Anderson*, 885 F.2d 1248, 1251-1255 (5th Cir. 1989) (en banc); *United States* v. *Williams*, 872 F.2d 773, 777 (6th Cir. 1989); *United States* v. *Herbert*, 698 F.2d 981, 986 (9th Cir.), cert. denied, 464 U.S. 821 (1983); see also *United States* v. *O'Mara*, 963 F.2d 1288, 1290-1291 (9th Cir. 1992) (following *Herbert*). Those courts reasoned that in unusual cases in which a semi-automatic weapon has been modified to be fully automatic with no outward markings to show that it has been altered, the possessor has no notice of the likelihood of regulation. In that setting, those courts held, the government must prove that the defendant knew the unregistered firearm he possessed could fire automatically

and thus was a "firearm" within the proscription of the NFA.

After we filed our brief in *Ross*, the D.C. Circuit decided *United States* v. *Harris*, 959 F.2d 246, cert. denied, 113 S. Ct. 362 (1992). In *Harris*, the defendants were convicted of violating 26 U.S.C. 5861(d) based on their possession of an unregistered MAC-10 machinegun. 959 F.2d at 249, 258. The jury was instructed that it could convict the defendants if they knew the MAC-10 was a gun, even if they did not know it was a machinegun. *Id.* at 258. The D.C. Circuit reversed, holding that the defendants could not be convicted without proof that they knew the weapon was a machinegun as defined in the NFA. *Id.* at 260. The court did not distinguish between weapons originally constructed as machineguns and those that had been converted from semi-automatic weapons; the MAC-10 involved in the case apparently was of the former class. The court concluded that "[t]he circuits are split on this issue."[1] *Ibid.* In light of *Harris*, we agree with petitioner (Pet. 9-28) that the circuits are divided over whether knowledge of a weapon's specific characteristics is an essential element of the crime described by Section 5861(d).

To be sure, the split in the circuits noted in *Harris* will not directly affect all federal prosecutions for illegal possession of machineguns. As we recently explained in our brief in opposition in *Jones* v. *United States*, No. 92-7025, the Criminal Division of the Department of Justice has instructed the United States Attorneys that any case involving the possession or transfer of a

[1] Since the court of appeals reversed on that count, the issue of the proper standard of intent under 26 U.S.C. 5861(d) was not raised in the defendants' petitions for a writ of certiorari in *Harris*, Nos. 91-8167, 91-8328, and 91-8333.

machinegun that was made after May 19, 1986, should be charged under 18 U.S.C. 922(*o*),[2] rather than 26 U.S.C. 5861(d). See 92-7025 Br. in Opp. 11; Criminal Division, U.S. Dep't of Justice, *Federal Firearms Statutes Federal Prosecution Manual* 79-80 (June 1992). That is because Section 922(*o*) entirely forbids individuals from possessing or transferring machineguns not lawfully possessed on May 19, 1986, and thus, through 26 U.S.C. 5812(a), precludes the government from accepting applications to register such guns. Accordingly, the government has determined that it is more appropriate to prosecute an individual found in possession of such a gun for possession under Section 922(*o*) rather than under Section 5861(d).[3]

[2] 18 U.S.C. 922(*o*) provides:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to—
>
> (A) a transfer to or by, or possession by or under authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Section 922(*o*) took effect on May 19, 1986. Firearm Owners' Protection Act, Pub. L. No. 99-308, § 110(c), 100 Stat. 461.

[3] As we explained in our brief in opposition in *Jones*, at 10-11, there appears to be a split in the circuits concerning the continued viability of Section 5861(d) after the enactment of Section 922(*o*). Compare *United States* v. *Jones*, 976 F.2d 176 (4th Cir. 1992) (holding that Section 5861(d) is still viable), petition for cert. pending, No. 92-7025, with *United States* v. *Dalton*, 960 F.2d 121 (10th Cir. 1992) (holding that Section 5861(d) was impliedly repealed by Section 922(*o*)). The Tenth Circuit in this case held that *Dalton*

Nonetheless, we believe that further review is warranted to resolve the conflict in the circuits presented by this case. First, some prosecutions will continue to be brought under Section 5861(d) for some machineguns manufactured before May 19, 1986, and the scienter issue presented here will apply directly in those cases. Second, the scienter issue in this case is likely to affect prosecutions under Section 922(*o*) as well. Section 922(*o*) ("it shall be unlawful for any person to transfer or possess a machinegun") uses language virtually identical to that of Section 5861(d) ("[i]t shall be unlawful for any person * * * to receive or possess a firearm which is not registered to him"), and the definition of "machinegun" in Section 922(*o*) is borrowed from the National Firearms Act. See 18 U.S.C. 921(a)(23). It is thus reasonable to assume that a conviction for violating Section 922(*o*) requires proof of the same mental state as does a conviction for violating Section 5861(d). The question presented in this case is therefore likely to have sufficient continuing importance to call for this Court's review.

---

was not applicable to machineguns that were purchased prior to the effective date of 18 U.S.C. 922(*o*). See Pet. App. 4a-8a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1993

Supreme Court, U.S.
FILED
JUL 7 1993
OFFICE OF THE CLERK

No. 92-1441

In The

Supreme Court of the United States

October Term, 1993

HAROLD E. STAPLES, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Whether, when enacting 26 U.S.C. § 5861(d) and 26 U.S.C. § 5845 of the National Firearms Act, and 18 U.S.C. § 922(o) (Supp. 1992), Congress intended to create a strict liability crime whereby the government must only prove that the defendant knew the device he possessed was a gun in the general meaning of that term to secure a felony conviction for "knowing" possession of an unregistered "machinegun" in violation of the National Firearms Act.

LIST OF PARTIES

The petitioner is Harold E. Staples, III, a resident of the State of Oklahoma. The respondent is the United States of America.

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 971 F.2d 608 (10th Cir. 1992) and reprinted in the Appendix to the Petition For A Writ of Certiorari (hereinafter "App.") at 1a-31a. The judgment denying Petitioner's Petition for Rehearing is unpublished and is reproduced in App. 32a-33a. The judgment and sentence of the United States District Court dated February 20, 1991 is unpublished and is reproduced in App. 37a-43a. The Order denying Petitioner's Motion for Judgment of Acquittal is dated February 1, 1991, and is reproduced in App. 34a-36a. This Honorable Court's Order granting Petitioner's Petition for a Writ of Certiorari was entered May 24, 1993.

JURISDICTION

On August 3, 1992, the United States Court of Appeals for the Tenth Circuit affirmed the felony conviction of Harold E. Staples, III. On November 4, 1992, the Court of Appeals denied Mr. Staples' Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Petition for a Writ of Certiorari was filed on March 4, 1993 and the Court granted the Petition on May 24, 1993.

STATUTES INVOLVED

This case involves the following statutes:

18 U.S.C. § 922. Unlawful acts

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to –

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

* * *

26 U.S.C. § 5845. Definitions

For the purpose of this chapter –

(a) Firearm. – The term "firearm" means . . . (6) a machinegun; . . . The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun. – The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun can be assembled if such parts are in the possession or under the control of a person.

* * *

26 U.S.C. § 5861. Prohibited acts

It shall be unlawful for any person –

* * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

* * *

26 U.S.C. § 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

A. Pre-Trial Events

This criminal action was commenced against one defendant, Harold E. Staples, III (hereinafter referred to as "petitioner") by way of Indictment filed on July 12, 1990. The indictment charged the petitioner in Count One with *knowingly* receiving and possessing two firearms both of which had been allegedly modified so as to be machineguns in violation of 26 U.S.C. § 5861(d).

The indictment filed in this case was based on the fruits of a search of the petitioner's home on December 29, 1989. Law enforcement officers representing the City of Jenks, Oklahoma Police Department and the Bureau of Alcohol Tobacco and Firearms (hereinafter "ATF") conducted a search of the petitioner's home and seized an M-1 rifle and an AR-15 semiautomatic rifle, a rifle bolt of unspecified nomenclature and manufacture, and a Beeman 552, 3 x 21 scope. The firearms of which the petitioner was charged with "knowing possession" were an M-1 .30 caliber World War II Carbine Rifle (hereinafter

the "M-1")[1] and an SGW .223 caliber model X M14A1 semiautomatic Rifle (minus certain parts and hereinafter referred to as the "AR-15").

B. Characteristics of the AR-15 Semiautomatic Sport Rifle

The AR-15 rifle is a civilian, semiautomatic version of the United States Military M-16 standard issue rifle. There are certain differences between the component parts of the fully automatic M-16 and its legal counterpart, the semiautomatic AR-15 rifle. Five parts used in the manufacture of these two rifles come in both "automatic" and "semiautomatic" versions: the bolt carrier, the selector switch, the trigger, the disconnector, and the hammer. Although an AR-15 can be assembled with the fully automatic versions of the bolt carrier, selector switch, trigger, disconnector, and hammer, the gun is still not capable of fully automatic fire without one additional part, the "sear" or "auto-sear." Thus, the exclusively semiautomatic versions of the bolt carrier, selector switch, trigger,

---

[1] The M-1 belonged to Harold E. Staples, Jr., the petitioner's father. The M-1 was brought home by Mr. Staples from his duty in World War II. (Tr. pp. 358-359). At trial, Mr. Staples testified that he was burglarized years earlier and the police had the M-1 in the "stolen property room" at the police department. (Tr. p. 361). Upon verifying ownership of the M-1, Mr. Staples then registered it with the government. It was uncontested that the National Firearms Registry showed that the M-1 was lawfully registered to Harold E. Staples, Jr. (Tr. pp. 57-59, Aplt. App. #Y, pp. 583-585). (Tr. p. 362) At his son's trial, Mr. Staples testified that he left the gun at the petitioner's home when he would be away for a few days. (Tr. p. 364). When the M-1 was seized, the petitioner was unaware the M-1 had been brought to his home by his father. (Tr. p. 373, Aplt. App. #K, p. 184). The petitioner was found not guilty of "knowing" possession of the M-1.

disconnector and hammer are called "AR-15 parts," while the *not exclusively* fully automatic parts of the same nomenclature are sometimes referred to as "M-16 parts." The sear, or auto-sear, has no semiautomatic counterpart and therefore, in all cases, would be an M-16 part.

Despite this difference between "M-16" parts and "AR-15" parts, many of the "after-market" manufacturers of civilian, semiautomatic models of the M-16/AR-15 have made and sold large numbers of the AR-15's out of M-16 fully automatic parts, that is, with the fully automatic or "M-16" version of the bolt carrier, selector switch, trigger, disconnector, and hammer. (Tr. pp. 304-306, Aplt. App. #O, pp. 228-230).[2] The reason is that the market became flooded with surplus (actually military-rejected) fully automatic "M-16" parts, and it was less costly to construct civilian AR-15's from those "M-16" internal parts, rather than to construct the AR-15 from specially made and more expensive semiautomatic "AR-15" parts. (Tr. p. 112, Aplt. App. #Q, p. 302). The AR-15 which is the subject of this action contains these common *internal* M-16 parts. (Tr. p. 95, Aplt. App. #Q, p. 285). The government's expert, a ATF enforcement officer, Agent McLaughlin, conceded at trial that the AR-15 rifles containing internal "M-16" components are still legal semiautomatic AR-15 rifles provided they are not equipped with the sear or auto-sear.[3] (Tr. p. 109, Aplt. App. #Q, p. 299).

---

[2] "Aplt. App." refers to the Appellant's Appendix which is a two volume set filed in the Tenth Circuit Court of Appeals in *United States v. Staples*, Case No. 91-5033.

[3] It was undisputed that there was no auto-sear seized nor had this AR-15 been modified to accommodate an auto-sear. (Tr. pp. 191-193, Aplt. App. #Q, pp. 325-327).

Even though, upon seizure, the AR-15 at issue was inoperable, absent critical parts and in a state of disrepair, the government prosecuted Mr. Staples for possession of an unregistered firearm. The fact of the matter is, and the ATF enforcement officer again conceded, that the AR-15 was and is not a registerable weapon pursuant to the National Firearms Act. This AR-15 at issue was not registerable because it was not equipped for an auto-sear, the essential registerable component which in and of itself would convert the AR-15 to a machinegun. The Registry did not and would not consider such a weapon a machinegun for registration purposes. ATF enforcement Officer McLaughlin testified:

> Q. (By Mr. Brewster) Could Mr. Staples have registered the AR-15 with the five M-16 parts in?
>
> A. No, sir.
>
> Q. So, the day before his house was searched, he couldn't have even registered the gun then?
>
> A. No, sir.
>
> Q. The gun wasn't registerable by him, was it?
>
> A. No, sir.
>
> Q. So he couldn't have complied with what you charged him with by registering the gun on December the 28th, could he have?
>
> A. Sir, I didn't charge him with anything.
>
> Q. What the government charged him with that you're testifying about. The day before anything ever happened, he couldn't have complied with the law if he wanted to, could he?
>
> A. No, because the law was amended on May, 1986 which forbade the private ownership of newly manufactured machine guns to civilians.
>
> Q. If he owned the gun prior to 1986 and it fired in semiautomatic fashion but owned it after that act that you're talking about, how could – he couldn't register it, could he?

> A. Well, something obviously happened to the weapon from the time that he owned it until the time it was seized. Because if it was semi-automatic before May 16th, 1986, there would have been no need to register it because it was a legal legitimate firearm.
>
> Q. He could have lawfully possessed it prior to the act taking effect?
>
> A. Certainly, as long as it didn't function automatically, no problem.
>
> Q. But if it then functioned automatically through this hammer follow down concept after 1986, he couldn't register it, could he?
>
> A. No. Because at that point, sir, it was contraband.
>
> Q. So if this hammer down follow effect occurred – I'm just trying to understand – after 1986, he is literally in possession of a gun he can't do much about?
>
> A. That's correct, ***other than once he discovered the condition that it would fire automatically, it's his responsibility to have it properly repaired, have the parts in it replaced with the appropriate AR-15 parts.***
>
> Q. Do you know whether he ever discovered that condition?
>
> A. I have no knowledge of that, sir. (Emphasis added).

(pp. 217-219, Aplt. App. #Q, pp. 351-353).

The government's evidence that this AR-15 fired multiple shots with a single trigger pull (not automatically) was revealed after this once disassembled, dirty, inoperable "firearm" was assembled with different parts, cleaned and oiled thoroughly and fired with soft primer ammunition. The weapon was reassembled by the government with a bolt carrier which was not the bolt that

originally fit this AR-15. (Tr. pp. 221-231, 378-391, Aplt. App. #Q, pp. 355-365 and #K, pp. 189-192). After these "adjustments" were made by the government agents, and after the gun was seized, the gun, when fired by the ATF Agent McLaughlin, malfunctioned to sporadically shoot multiple shots with a single trigger pull. (Tr. pp. 221-231, 102-104, Aplt. App. #Q, pp. 355-365 and pp. 292-294). The government's best theory arguing the guilt of the petitioner was that the AR-15 could now malfunction to fire "fully automatic" because the AR-15 was modified in that the metal "stop" on the "auto" to "semi" selector switch was worn or filed down and thus the gun was enabled to misfire sporadically. (Tr. pp. 185-189, Aplt. App. #Q, pp. 318-323). At trial, the government failed to link this alleged modification of the selector switch to the petitioner. Further, as discussed more fully herein, the petitioner testified that he did not know, nor did he have reason to know, that the "stop" was filed down or worn.

The selector switch on the side of the semiautomatic AR-15 was intended for use on an M-16. On M-16's which are manufactured with an auto-sear and are, by definition, machineguns, this selector switch enables the user to chose either semiautomatic or automatic fire. Thereafter, the M-16, *by function of the auto-sear*, fires, reliably and by design, more than one shot with a single pull of the trigger. Literally tens of thousands of the AR-15 semiautomatic sport rifles in use have this M-16 selector switch because many civilian version AR-15's were manufactured with surplus M-16 parts, excepting the auto-sear. Of course, the selector switch in the exclusively semiautomatic AR-15 is useless in any mode other than the semiautomatic because the gun is not designed or equipped for automatic fire without one essential component – the auto-sear. In fact, when these surplus M-16

selector switches are found on the civilian AR-15, this switch usually has a metal bump or protrusion referred to as a "stop" that acts to prevent the selector switch from rotating to automatic mode. AR-15 semiautomatic sport rifles with M-16 selector switches are in the closets of thousands of citizens. These sport rifles are openly sold at gun shows across America to innocent purchasers who are unaware, as was the petitioner, that they are at risk of prosecution and substantial penalties that accompany felony crimes.

C. The Jury Trial of the Petitioner

A jury trial of the petitioner commenced December 17, 1990. The petitioner called two experts to testify in his defense, one of whom was Bill Fleming, a local manufacturer and dealer of machineguns. Mr. Fleming was often called upon by law enforcement as a consultant. (Tr. pp. 302-303). Mr. Fleming testified that AR-15 rifles with internal M-16 components will not fire "automatically more than one shot with a single pull of the trigger" but that "occasionally you will get a malfunction" which results in two or three shots firing with a single pull of the trigger. (Tr. pp. 305-306, Aplt. App. #O, pp. 229-230). Mr. Fleming further described what measures can be taken to allow an AR-15 to malfunction causing sporadic fire of more than one shot with a single trigger pull, such as down loading the magazine, use of special ammunition and a thorough cleaning and oiling of the rifle. (Tr. p. 307, Aplt. App. #O, p. 231). Mr. Fleming further testified that a worn or filed off selector switch does not make an AR-15 into a machinegun. (Tr. p. 310, Aplt. App. #O, p. 234).

This malfunction of the AR-15 with internal M-16 components known as "hammer follow through," "hammer follow down" or "slam down," was solely relied

upon by the government as evidence that the subject AR-15 was a machinegun. This malfunction was clarified by Mr. Fleming and further elaborated on direct examination by Mr. Charles Fagg, the petitioner's additional expert witness. Mr. Fagg is a firearms' engineer having received his bachelor of sciences degree from the University of Texas at Austin. Mr. Fagg was employed by the government from 1957-1979 following his naval service. (Tr. p. 322). Mr. Fagg worked for the Department of the Army as an engineer on the technical staff of "Project Manager Rifles." The purpose of this project was to introduce M-16's into the Army. Mr. Fagg's testimony demonstrates his extensive knowledge of the M-16: "I have done many studies dealing with the M-16. There is probably not a part on the M-16 that I have not done some form of study on." (Tr. p. 323). Mr. Fagg described the malfunction known as "hammer-follow down" as follows:

Q (By Mr. Brewster) Sir, as the weapon presently exists, does the subject weapon shoot automatically?

A It malfunctions to produce multiple shots. I could not call it automatic fire by any stretch of the imagination.

Q What is happening to cause it to fire more than one shot?

A When the selector lever is placed in the automatic fire position, what would be the automatic fire position, it depresses the tail of the disconnector. And when that occurs, when the bolt carrier comes to the rear, it cocks the hammer into the cocked position, and then as the bolt carrier moves back forward, instead of being retained and then later striking the primer below, it simply follows its cam cocking surface, its cocking cam surface, it follows it back into position and rests against the firing pin so that

the inertia of just the firing pin and this hammer, which is now slowed considerably, on some ammunitions the primer will be sensitive enough that will fire it.

Q And what is that called, sir?

A That is called a follow down malfunction.

(Tr. pp. 326-327, Aplt. App. #P, pp. 251-252). The prosecution expert, ATF enforcement Officer McLaughlin, conceded that when hammer follow down occurs, the AR-15 is not *reliably* firing multiple shots with a single trigger pull. (Tr. pp. 194-198, Aplt. App. #Q, pp. 328-332).

Additionally, the petitioner presented evidence at trial below that the subject AR-15 fired only semi-automatically in years 1983, 1984, 1985, 1986, 1987, 1988 and until seizure by the government in 1989. The Tenth Circuit decision in *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992) makes no mention of this critical testimony which is set forth in the Addendum to the Statement of the Case at p. 13.

At the close of evidence, Mr. Staples' jurors were instructed as follows:

Essential Elements of the Crime (26 U.S.C. § 5861(d))

In order to establish the offense charged in the indictment, each of the following essential elements must be proved beyond a reasonable doubt:

First: that the defendant knowingly possessed the firearm described in the Indictment; and

Second: that such firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.

The unlawful offense is complete when the two separate elements just stated are proved.

Knowingly to Possess

A person is knowingly in possession if his possession occurs voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted of possession of a firearm if he did not intend to possess it.

The Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril.

Mere Possession of Unregistered Firearm

Mere possession of an unregistered firearm is a violation of the law of the United States. *It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed it.* (Emphasis added.)

The petitioner was convicted of knowing possession of an unregistered "machinegun" (the AR-15) on December 19, 1990. Petitioner's Motions for Judgment of Acquittal were overruled by the trial court by written order filed February 1, 1991. (App. 34a-36a).

D. Post-Trial Events

On February 20, 1991, the trial court entered its judgment and imposed a suspended sentence, placing the petitioner on probation for five years, requiring him to dispose of all guns and refrain from possessing guns of

any kind, and fining him $5,000.00 and a $50.00 monetary assessment. (App. 37a-43a.)[4]

Petitioner filed his timely Notice of Appeal on February 22, 1991 and commenced his appeal to the United States Court of Appeals for the Tenth Circuit. On August 3, 1992, the Court of Appeals affirmed the conviction. (App. 1a-31a.) On August 17, 1992, the petitioner filed his Petition for Rehearing with Suggestion for Rehearing *en banc*, which the Court of Appeals denied on November 4, 1992, affirming its initial decision. (App. 32a-33a).

On March 4, 1993, petitioner filed his Petition for a Writ of Certiorari before this Court.[5] On May 24, 1993, the Petition was granted.

ADDENDUM TO STATEMENT OF THE CASE

The following testimony was presented at trial in defense of the petitioner.

From the petitioner, Harold E. Staples, III: (Tr. pp. 374-384, Aplt. App. #K, pp. 185-195).

Q. (By Mr. Brewster) Sir, in connection – reviewing this document, can you tell the ladies and gentlemen precisely when you purchased the AR-15?

A. It is dated here 4/9 of 1983 . . .

Q. Did you have the occasion to fire the weapon after you purchased it?

A. Yes, sir . . .

Q. Now, tell the ladies and gentlemen of the jury about the occasion you had to fire the weapon.

---

[4] Petitioner filed two Motions to Stay Execution of Sentence pending appeal. Both Motions were granted. (Tr. Docket Nos. 71 and 79).

[5] Petitioner was granted an extension of time to file his Petition for a Writ of Certiorari on January 22, 1993.

A. In fact, it was the very day that I purchased it. I left – I believe at that time I went to my father's residence which is in Okmulgee County, rural area. I picked up some ammunition at the gun show. Being excited about buying it, I couldn't wait till I could get there and shoot it. I was very disappointed when I got to my father's farm. The gun wouldn't function. It would not function properly in the semiautomatic mode. The gun was defective in some way.

Q. Well, describe for the ladies and gentlemen of the jury the experience of firing it, what occurred.

A. Okay. I loaded the clip. I put the clip in. I put a shell into the rifle, fired it. It would not inject the other – the next shell. I tried it, I don't know how many times. Many, many times. It would not inject the shell. I did not know anything about the rifle or any way of fixing it or anything else. Basically, I was very disappointed.

Q. All right. Did you shoot the weapon after that first day that you shot it, the day you purchased it?

A. Yes, sir. Sometime later I had shot it at different intervals of time and it functioned just the exact same way . . .

By David Seabolt: (Transcript of Jury Trial, 12/17/90, pp. 290-295, Aplt. App. #L, pp. 206-211).

Q. (By Mr. Brewster) David, let me hand you what has been marked and received into evidence as plaintiff's Exhibit Number 2 and ask you to look at it closely. Do you recognize that weapon?

A. Yes, sir.

Q. Is that the weapon you shot?

A. Yes, sir. I have shot this weapon.

Q. When did you shoot that weapon?

A. I have shot it numerous occasions.

Q. Over what period of time, do you know?

A. Since the weapon was purchased. I couldn't say how many times I have shot it.

Q. Was there ever a time when you considered that weapon to be your own?

A. Yes, sir. This weapon was mine.

Q. Explain to the ladies and gentlemen of the jury.

A. My Uncle Hal bought this weapon, and he couldn't get it to function right. So we couldn't get it to function right, so he gave it to me on the stipulation I could get it to function right. So I took it, and I took it home. My dad worked on it, and we couldn't get it to work right, and – but it was mine, I mean.

Q. Describe for the ladies and gentlemen of the jury what would happen when you would shoot the weapon that you have in your hands, Plaintiff's Exhibit Number 2?

A. You – when you would pull the trigger, it would fire, and that would be it. You would have to pull the charging handle. It would eject, load another shell, fire again. That is the only way it would shoot.

Q. How many times would you say you've fired it?

A. I have fired this at least 1000 rounds.

Q. How many times would you say young Brian[6] had fired it?

A. At least three to 400 rounds.

Q. How many occasions would you and Brian go and fire the weapon?

A. Whenever we would skip school or after school or whenever we could get a chance, that's when we went and did it.

Q. Where did you get your ammunition?

A. Anywhere we could we get it. Brian brought a lot of it. He would take from his dad's garage. We would buy it at stores. I have bought some at the gun show. Just anywhere we could get it, we got it.

Q. Did you ever learn that, David, from experimentation with the gun, how to make the gun shoot better than you have described for the ladies and gentlemen of the jury?

A. Well, we experimented a lot. We would take the AR-15 that Brian brought down there, Mr. Jobson's, and we would take parts and interchange them, trying to make it fire better.

Q. Did you ever – were you ever – did you ever accomplish –

A. We got it to fire decent, you know, semiautomatic. It would still jam every once in a while, you know, but it never fired fully automatic.

Q. What did you do to improve its semiautomatic capability? What did you do? You said you changed parts. Was there any part –

A. We would change the bolt. It's easy accessible, just change the bolt out.

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[6] "Brian" refers to Brian Jobson, son of ATF Agent Lewis Jobson. Agent Jobson was the case agent assigned to the *Staples* prosecution and sat at the prosecutor's table throughout trial.

Q. And did that help it?

A. It fired – it would fire four or five times semiautomatic, and then it would jam up again.

Q. Did it ever shoot more than one shot when you pulled the trigger, David?

A. No, sir.

Q. Ever?

A. Not – not me, no, sir.

Q. Did you ever try to make it?

A. No, sir.

Q. Do you know, in your presence did anyone else ever pull the trigger and have it fire more than once?

A. Not in my presence, no, sir.

Q. Did your Uncle Hal ever shoot it in your presence?

A. Yes, sir. We shot it.

Q. Did it ever fire more than one shot when he fired it?

A. No, sir.

By Brian Jobson: (Transcript of Jury Trial, 12/17/90, pp. 368-370, Aplt. App. #M, pp. 215-217).

Q. (By Mr. Brewster) Brian, let me direct your attention to – at a time somewhere in, let's say, '86 to, let's say, '89. Did you ever have occasion to shoot guns with a young man named David Seabolt, a young man named Chris Peak?

A. Yes, I did.

Q. Did you ever shoot a weapon known as an AR-15?

A. Yes, I did.

Q. And did you have many occasions with those boys to go out and shoot guns?

A. Several.

Q. All right. Did you know whether David had an AR-15 that he maintained as his own gun?

A. He had in his possession one.

Q. Did you ever have an opportunity to shoot it?

A. Yes, I did.

Q. All right. Would you recognize that gun if you looked at it?

A. Maybe.

MR. BREWSTER: Your Honor, may I approach the witness, please?

Q. (By Mr. Brewster) Brian, let me hand you what's been marked and received into evidence as plaintiff's Exhibit Number 2. That is an AR-15, and I'd like you to look at it. Tell me if you can if you recognize the gun?

A. I can't positively identify it, but it is a very similar gun.

Q. Okay. If it was David's gun, would it have been the gun that you had an opportunity to shoot and see shot?

A. Yes.

Q. And the time span that I'm talking about would have been, let's say, '87, '88,-'89. Would that be consistent with your recollection?

A. Somewhere in there.

Q. All right. Would you describe for the ladies and gentlemen of the jury how that weapon shot when you shot it?

A. When I shot the weapon, it fired one shot, and then you'd have to work the action to eject the empty casing and load in a new casing.

Q. Did it ever, Brian, fire more than one shot with one pull of the trigger?

A. Not when I fired it.

Q. Did you ever see it fired in that fashion?

A. No, I did not.

Q. And the many times that you saw David fire it, did it fire in the same fashion as when you fired it, that being one shot and then lodging a bullet in the chamber?

A. Yes.

Q. Did it appear that it was malfunctioning?

A. Yes, it did . . .

Chris Peak corroborated this testimony by stating that in 1987 and 1988, "It fired semiautomatic where you pull the trigger, it would fire one time. About every three or four times, it would jam. That's the best of what I know." (Tr. p. 287, Aplt. App. #N, p. 222). The foregoing evidence, which was UNCONTROVERTED by the government establishes that the AR-15 malfunction, but fires at best semiautomatically until it was in the hands of the government in 1989.

SUMMARY OF ARGUMENT

The opinion of Tenth Circuit Court of Appeals in this case holds that no *mens rea* element is required to be proven in criminal prosecutions for violations of 26 U.S.C. § 5861(d). The opinion of the Tenth Circuit Court of Appeals thus considers violations of 26 U.S.C. § 5861(d) to be strict liability crimes. The sole issue before this Honorable Court is whether a defendant must have knowledge that the item he or she possesses is a "firearm" as that term is defined in 26 U.S.C. § 5845 to secure conviction under 26 U.S.C. § 5861(d).

Criminal offenses requiring no *mens rea* have a generally disfavored status. *Liparota v. United States*, 471 U.S. 419 (1985). 26 U.S.C. § 5861(d) omits any mention of scienter as an element of the offense. However, this Court

has held that "certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States v. United States Gympsum Co.*, 438 U.S. 422, 438 (1978).

There is a split in the Circuit Courts of Appeal on the issue raised in this case. However, those decisions which embark upon thorough discussion of statutory construction, common law principles and legislative intent have required the government to prove that the defendant knew the item possessed was a "firearm" as that term is defined in the National Firearms Act. *See, United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) (*en banc*); *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992) (per curiam).

The petitioner respectfully submits that the rule of lenity be applied by this Court in interpreting 26 U.S.C. § 5861(d) and that the ambiguity present in said statute should be resolved in favor of the petitioner.

ARGUMENT

THE EXISTENCE OF *MENS REA* IS AN INDISPENSABLE ELEMENT TO SECURE A FELONY CONVICTION FOR ALLEGED VIOLATIONS OF THE NATIONAL FIREARMS ACT

A. INTERPRETATIONS OF THE ELEMENT OF MENS REA IN PROSECUTIONS PURSUANT TO THE NATIONAL FIREARMS ACT

The term *"mens rea"* is rivaled only by the term "jurisdiction" for the varieties of senses in which it has been used and for the quantity of obfuscation it has created.[7] As Blackstone stated: "An unwarrantable act

[7] Kadish, Sanford H. *Blame and Punishment, Essays in the Criminal Law*, at p. 65 (Macmillan Pub. Co. 1987).

without a vicious will is no crime at all." The vicious will was the *mens rea*. Reduced to its essence it referred to the choice to do a blameworthy act. The requirement of *mens rea* was rationalized on the common sense view of justice that blame and punishment were inappropriate and unjust in the absence of that choice.[8]

The cases of this Court follow the "familiar proposition that 'the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *United States v. United States Gypsum Co.*, 438 U.S. 436 (1978). On numerous occasions, this Court has relied upon the words of Mr. Justice Jackson delivered in *Morissette v. United States*, 342 U.S. 246, 250-251 (1952):

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' (Footnotes omitted.)

[8] *Id.*

As stated by this Court in *United States v. United States Gypsum Co.*, 438 U.S. 436, 437 (1987).

> Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality . . . *intent generally remains an indispensable element of a criminal offense.* This is true in a sophisticated criminal antitrust case as in one involving any other criminal offense. (Emphasis added.)

The fundamentals of the *mens rea* element and its applicability to a National Firearms Act violation were explored by this Court in *United States v. Freed*, 401 U.S. 601 (1971). The *Freed* opinion has been the subject of great debate in the United States Circuit Courts of Appeal on the issue presented in this case. In *Freed*, the defendant was in possession of a hand grenade which he failed to register in violation of 26 U.S.C. § 5861(d). The defendant alleged that he did not know that hand grenades required registration. The trial court dismissed the indictment which neglected to contain an allegation of scienter. This Court stated that the National Firearms Act:

> is a regulatory measure in the interest of public safety which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act.

Freed, 401 U.S. at 609.

In his concurring opinion, Justice Brennan states, "this case does not raise questions of 'consciousness of wrongdoing' or 'blame worthiness.'" Justice Brennan specified the quantum of proof the prosecution must meet:

> The government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades. Thus, while the Court does hold that no intent at all be proven in regard to one element of the offense – the unregistered status of the hand grenades – knowledge must still be proven [that the defendant possessed items which items were hand grenades]. Consequently, the National Firearms Act does not create a crime of strict liability as to all its elements.

Freed, 401 U.S. at 612.

The *Freed* decision has been extensively relied upon by federal appellate courts in deciding the issue of scienter and its application, if any, under the National Firearms Act. Four Circuit Courts of Appeal have cited *Freed* for the holding that sufficient intent is established if the defendant is shown to have possessed an item which he knew to be a firearm in the general meaning of that term. *See Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977); *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987); *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987); *United States v. DeBartolo*, 482 F.2d 316 (1st Cir. 1973). In more recent decisions, federal courts of appeal have distinguished *Freed*, finding that "it may well be that all guns of whatever kind are dangerous, but Congress decided to require registration of only certain kinds of firearms that it thought were highly dangerous." *See United States v. Anderson*, 885 F.2d 1251 (5th Cir. 1989) *(en banc)*; *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992); *United States v. Williams*, 872 F.2d 773 (6th Cir. 1989). In the Ninth Circuit Court of Appeals, a defendant who possesses a "firearm" whose external characteristics would *not* necessarily alert its owner to the likelihood of regulation, the government must prove knowledge that the gun was a firearm in the sense of the Act. *See United States v. O'Mara*, 963 F.2d 1288 (9th Cir. 1992); *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983), *cert. den.*, 464

U.S. 821 (1983); *United States v. Kindred*, 931 F.2d 709 (9th Cir. 1991).

The Fifth Circuit Court of Appeals was the first circuit court to distinguish *Freed* in the *en banc* decision of *United States v. Anderson*, 885 F.2d 1251 (5th Cir. 1989). Joe Alvin Anderson was convicted of possession of unregistered firearms, including a .38-caliber "machine pistol," a .45 caliber pistol, and a silencer. Also seized by law enforcement were manuals giving step-by-step instructions for the conversion of semiautomatic pistols into fully automatic ones. *Anderson*, 853 F.2d at 313. The "modification" alleged by the government was of the .38 caliber pistol and consisted of "cutting, grinding or polishing a 'strip' magazine to convert the weapon from semiautomatic to fully automatic operation." *Anderson*, 853 F.2d at 315. The jury was instructed that to convict, they need only find that Anderson knew that the items he possessed were firearms within the general meaning of the term. Despite expressions of grave concern for innocent possessors of unregistered "firearms" the Fifth Circuit Court considered itself to be bound by the precedent of *United States v. Vasquez*, 476 F.2d 730 (5th Cir. 1973), *cert. den.*, 414 U.S. 836 (1973). The conviction was upheld.

The Court of Appeals then reversed Anderson's conviction in an *en banc* decision and stated as follows with regard to *Freed*:

> What the *Vasquez* panel overlooked is that the issue upon which it was pronouncing was not before the *Freed* court at all and that the expressions from that opinion on which it founded its position are not even dicta upon the question that we face today, but merely observations along the way to decision of a different issue entirely. That issue, as shown both by the somewhat cryptic opinion of the *Freed* Court and by the briefs of the parties in that appeal, summarized at 28 L.Ed.2d 1007 *et seq.*, was not the issue

> in today's case – which is whether the defendants could be convicted only if they knew what they possessed was a "firearm" in the Act sense or whether their knowledge merely that it was a firearm in the ordinary sense would suffice. Indeed, that neither was nor could have been the issue in *Freed*, for what the *Freed* defendants possessed was hand grenades; and hand grenades are not firearms in the general or dictionary sense at all. Such an issue was not before the Court, and the Court did not decide it. Indeed, it could not have done so, for – as is made embarrassingly clear by passages from the Government's *Freed* brief, quoted in the margin – the Government *conceded* that it had to prove that the item possessed was known to the defendant to be a "firearm" in the Act sense.[9]
>
> *Anderson*, 885 F.2d at 1252.

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[9] In footnote 6, the *Anderson* Court stated:

> At pages 7 and 8 of the "Brief for the United States" in *Freed*, filed by then Solicitor General Griswold on December 3, 1970, appears a passage which the Court partly incorporated in its opinion:
>
> The district court erred in construing Section 5861(d) as requiring as an element of the government's proof a showing that the transferee obtained possession of a firearm with specific knowledge and intent that the firearm be unregistered. The statute contains no language suggesting the need for such proof, and the history of its predecessors, both in Congress and in the courts, conclusively shows that such a construction has never been thought to be part of the statute, or necessary to save the statute from constitutional doubt. All that the government needs to show is that the individual charged possessed the firearm which was unregistered, *with knowledge that it was a firearm*, and with intent to possess it.

In *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992) (per curiam), the Federal Circuit Court followed *United States v. Anderson* in holding that knowledge was required to be proven to secure violations of § 5861(d). In *Harris*, the defendants were convicted of various firearm violations in connection with narcotics offenses. The Federal Circuit Court interpreted *Freed* as follows:

> *Freed* did not address the question similar to the one raised by our case: suppose the government did not show that the defendant knew the object he possessed was a hand grenade. Surely it is not inconceivable that someone ignorant of weaponry should come into possession of a hand grenade thinking it something entirely different – perhaps an antique projectile fired out

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Given the extremely dangerous character of firearms subject to the Act, it is inaccurate to characterize such a construction as imposing a penalty "for conduct alone without regard to the intent of the doer." *Lambert v. California*, 355 U.S. 225, 228 [78 S.Ct. 240, 242, 2 L.Ed.2d 228 (1957)]. *The very nature of the weapons* is sufficient to apprise an individual possessing them that they are likely to be resulted, and thus is also sufficient to make a failure to inquire as to the lawfulness of the possession culpable behavior in the ordinary sense. Hand grenades are certainly no less dangerous than narcotic drugs, as to which similar penalties have always been found proper. *United States v. Balint*, 258 U.S. 250, 254 [42 S.Ct. 301, 303, 66 L.Ed. 604 (1922)]. . . . The government must show that appellees were in possession of hand grenades, knowingly and intentionally; but it need not show any knowledge or intent on their part that these grenades be unregistered (emphasis added throughout). The same brief also states (p. 25): "To be sure, there must be some evidence of mental state – that the accused *knew he possessed a firearm* and that he intended to be in possession;. . . ." (Emphases added.)

> of nineteenth century mortar. To be sure, the Court describes hand grenades as "highly dangerous and offensive weapons" that put a citizen on notice to "ascertain at his peril" whether possession is regulated . . . But this proposition necessarily assumes that the defendant knew he possessed a hand grenade. . . . If the defendant did not know the object's dangerous properties because he did not know what the object was, the Court's logic does not apply.

Harris, 959 at 260.

In *United States v. Williams*, 872 F.2d 773 (6th Cir. 1989), the defendant sold an AKS Sporting rifle to an undercover agent. An expert determined that the weapon had been converted to a fully automatic rifle by internal modifications. *Williams*, 872 F.2d at 774. Williams was convicted pursuant to 26 U.S.C. § 5861(d). The court noted that *both* parties relied heavily on *Freed* and stated:

> *Freed* presupposes proof of knowledge that one is dealing with an instrumentality from which one can infer that regulation is likely, an observation shared by the court in *United States v. DeBartolo*, 482 F.2d 312 (1st Cir. 1973):
>
> In *Freed*, it is true, that the court assumed that the government would have to prove that the defendant knew the grenade was a grenade, hence a "firearm." Such assumption was expressly stated by Justice Brennan in his concurring opinion. *Williams*, 872 F.2d at 774.

The Ninth Circuit Court of Appeals interpreted *Freed* as follows:

> . . . the court determined that the prosecution did not have to prove that the defendant knew that the hand grenades were unregistered, nor did it have to prove that the defendant knew of the registration requirement. Nevertheless, the statute does require the prosecution to prove some knowledge on the defendant's part. The

> court explained that the prosecution must prove that the defendant knew that the device was a firearm.

See United States v. Kindred, 931 F.2d 609, 611 (9th Cir. 1991). *See also, United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983) and *United States v. O'Mara*, 963 F.2d 1290 (9th Cir. 1992).

Those courts that cite *United States v. Freed* for the holding that § 5861(d) offenses are strict liability crimes fail to provide well-reasoned justification for so finding. For example, in *United States v. Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), the court concludes:

> The offenses with which defendant was charged were not specific intent crimes, and the government was not required to prove either that he knew that possession of the weapon was against the law or that registration of the weapon was required. Citing, *United States v. Freed*, 401 U.S. 601 (1971) (other citations omitted).

Advocates of strict construction of penal statutes believe that the *mens rea* holding in *Freed* spawned a number of dubious decisions and an even larger number of dubious prosecutions. One author opined:

> The overbreadth of the *Freed* opinion invites prosecutors to apply § 5861 not only to persons who did not know of the unregistered status of the dangerous weapons they possessed but also to those who did not even know that they were in possession of dangerous weapons.

Batey, Robert, "Strict Construction of Firearms Offenses: The Supreme Court and the Gun Control Act of 1968." 49 *Law & Contemp. Probs.* 163 (Wint. 1986).

The petitioner respectfully contends that *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992) is one such decision resulting in injustice. Further analysis of judicial decisions advocating strict liability for NFA violations follows.

B. DECISIONS OF THE TENTH CIRCUIT AND OTHER CIRCUIT COURTS WHICH VIEW VIOLATIONS OF 26 U.S.C. § 5861(d) AS STRICT LIABILITY CRIMES

Because of the recency of the federal circuit opinion, the Tenth Circuit may not have had the benefit of the *Harris* decision when it upheld the conviction of the petitioner. The Tenth Circuit Court was "bound" by *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987). In the *Mittleider* decision, enforced and expanded in *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992), the Tenth Circuit Court of Appeals merely pronounced, absent clear reasoning, that knowledge was not a necessary element to secure a conviction for violations of 26 U.S.C. § 5861(d). The Tenth Circuit Court cited no support for this pronouncement – no basis in statutory construction or legislative intent. The reasoning for the *Mittleider* holding is also absent from the Court's opinion.

In *Mittleider*, the defendant, an army AWOL using a false name acquired a semiautomatic J-15 rifle. The gun was later converted to fully automatic and sold by the defendant to an undercover agent. The defendant also sold a semiautomatic AR-15 rifle with a conversion kit to the same agent, who was posing as a survivalist in the market for machineguns. The record indicated that the defendant had ACTUAL KNOWLEDGE that the J-15 rifle had been converted into an automatic weapon. The jury in *Mittleider* was instructed:

> The mere possession of a firearm which is required to be registered and has not been registered is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon in his possession was a machinegun within the meaning of the statute or that he knew that registration was required. It is sufficient if you

> find beyond a reasonable doubt that he knowingly possessed it.

Mittleider, 835 F.2d at 774.

The Tenth Circuit Court found that this instruction "contains an accurate statement of the applicable law" because the crimes charged were not "specific intent crimes," citing *United States v. Freed*, supra. *Mittleider*, 835 F.2d at 774.

The evidence which was UNCONTROVERTED at trial in the *Staples* case, and which was omitted from any discussion by the Tenth Circuit Court of Appeals in rendering its decision, was that this AR-15 was defective and fired, if at all, only *semi*automatically during years 1983, 1984, 1985, 1986, 1987, 1988 and 1989 until the government's seizure and possession of the AR-15 for several months *pre-indictment*.[10] The testimony of the petitioner, David Seabolt, Chris Peak, and Brian Jobson, unchallenged by the government, established that the weapon fired *semi*automatically, if at all, and that the defendant had no knowledge of its claimed automatic capability. Hence, Circuit Judge Ebel's statement in the *Staples* concurring opinion is applicable here:

> In cases in which the defendant is truly ignorant of the automatic characteristics of the gun . . . the law as construed in *Mittleider* may lead to draconian results. [*United States v. Staples*, 971 F.2d at 617 (Ebel, J. Concurring)].

Judge Ebel agreed that "this panel by our precedent in *Mittleider*," but wrote separately "because in [his] view the growing trend in the law is to require the government to prove knowledge of the characteristics of the weapon that make its possession a crime." *Staples*, 971 F.2d at 617.

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[10] See the testimony supporting this assertion set forth in the Addendum to the Statement of the Facts.

The conviction of the petitioner was based upon an alleged modification of a selector switch on the AR-15. This modification does not, by itself, permit the AR-15 to fire more than one shot with a single trigger pull. Under the holding in *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987), this modification becomes the *sole* consideration in the instant case as to whether this AR-15 is a "dangerous device of such type that would alert one to the likelihood of regulation." However, under *Mittleider*, the government need not prove that the defendant knew of the weapon's automatic capabilities, i.e. the government need not prove that the defendant knew that the AR-15 selector switch was filed or worn down. In the opinion in this case, however, the Tenth Circuit Court goes one step further and states that *the defendant* should have presented evidence proving *when* the switch was filed off further abrogating the burden of proof which is borne by the government. *See United States v. Staples*, 971 F.2d 608, 611, (10th Cir. 1992).

In *Staples*, the Tenth Circuit Court stated:

> The uncontested testimony at trial of ATF Agents Ward and McLaughlin was that the weapon's selector switch located on the exterior of the receiver, could be turned to the automatic fire position and that there was a shiny spot on the receiver indicative of tampering.

United States v. Staples, 971 F.2d at 613 (10th Cir. 1992).

The petitioner raised the issue at trial of when the selector switch was allegedly filed through the testimony of Robert Yerton. Officer Yerton took photographs of the AR-15 on December 13, 1990, after the gun had been in the government's possession, specifically at the ATF laboratory, for almost one year. Officer Yerton admitted that there could be metal filings next to the weapon which would indicate a *recent* grinding of the selector switch. This testimony contradicts the statements of the ATF

agents relied upon by the Tenth Circuit and Officer Yerton's uncontroverted testimony was raised at the first opportunity in Tenth Circuit appeal.

Further, as stated above, the Tenth Circuit has required by its decision that *the defendant* prove when the stop was filed off. The appellant respectfully contends that this requirement is beyond *Mittleider*. However, the petitioner did present evidence on this issue and the petitioner testified at trial as follows:

> Q. Now, sir, I want you to pick up Government's Exhibit Number 2 once again and hold it. I want to direct your attention to the left side of the receiver where there's a little tiny spot by the selector switch. Now, I want you to explain, if you can, to the ladies and gentlemen of the jury what caused that.
>
> A. I don't ever recall the gun, this being there. Of course, its been several years since I've seen it, but I don't ever recall this being there.
>
> Q. Did you request an opportunity to see the items taken from your home before they were taken by the agents?
>
> A. Yes, sir, I did.
>
> Q. Did they allow you to do so?
>
> A. No, sir.

Consider this testimony together with the trial testimony of ATF Agents Ward and Sprague. ATF Agent Lowell Sprague testified that he photographed all seized evidence at the Staples' garage on December 29, 1989, but did not testify concerning the condition of the selector switch. Agent Sprague's photos were not introduced in the government's case. (Tr. pp. 30-34, Aplt. App. #R, pp. 412-416). ATF Agent Ward testified that "when he saw- . . . the receiver of this weapon . . . he saw a dot on the side of the receiver [and] . . . indicated that the post had been grinded off to go into fully automatic position." [Tr.

pp. 39-40, Aplt. App. #R, pp. 381-382]. ATF Agent Blair failed to testify as to when he saw the weapon in a state where the stop had been filed off. Further, ATF Agent McLaughlin testified that there was a "shiny spot" over the selector switch, and his "educated guess" was that "*someone* had taken a saw or possibly a file or a grinding tool to [the switch] and removed it." (Tr. pp. 101-102, Aplt. App. #Q, pp. 291-292). **Thus, the government wholly failed to establish when the selector switch was allegedly ground off, and utterly failed to link that alleged act to the petitioner.**

This Court must consider what is required of a citizen when faced with this predicament. The petitioner testified that he did not modify the weapon, the government failed to prove who modified the AR-15 and when it was modified. It was also established at trial, that with the exception of a few weeks prior to seizure, the weapon had been possessed by the petitioner's nephew for a period of years. (Tr. p. 291, Aplt. App. #L, p. 207). The petitioner was further denied the opportunity to view the seized evidence. The government indicted him seven months later for failing to register this allegedly modified AR-15. Photographs taken of the weapon months after seizure show metal filings evidencing a RECENT grinding of the switch. The petitioner respectfully agrees with Judge Ebel in that it is truly draconian that this set of circumstances resulted in conviction. *Staples*, 971 F.2d at 617.

* * *

The petitioner's conviction would have been upheld in the First, Fourth, Seventh and Eighth Circuit Courts of Appeal. *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987) was relied upon heavily by the Tenth Circuit Court

in the *Mittleider* opinion. However, in *Shilling*, the defendant possessed some fifty guns, ten of which were originally legal semiautomatic rifles that had been internally altered. Shilling possessed a pen gun, a silencer and a short-barrelled rifle, and was charged with narcotics offenses. There was "substantial" circumstantial evidence presented that Shilling knew that his weapons were converted. The circuit found that *Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977) was instructive and persuasive and, therefore declined to find that the National Firearms Act required any specific intent to secure conviction.

In *Morgan*, the defendant was found guilty of possessing an unregistered Colt M-16 machinegun. In 1977, when *Morgan* was decided, the interpretive repercussions of the Gun Control Act had not been realized. Furthermore, the circuit courts of appeal which had decided this issue at the time of Morgan's appeal all agreed that violations of § 5861(d) were strict liability crimes. In *Morgan*, the court cited this Court's *Freed* decision in support of their holding:

> In *United States v. Freed*, 401 U.S. 601 (1971), the Supreme Court concluded that the Act required no specific intent or knowledge that the weapons possessed were unregistered. "The Act makes it unlawful for any person 'to receive or possess a firearm which is not registered to him.'" (Footnote omitted). . . . the Supreme Court added: By lower court decisions at the time that requirement was written into the Act, the only knowledge required to be proved was knowledge that the instrument possessed was a firearm. Citing *Sipes v. United States*, 321 F.2d 174 (8th Cir. 1963).

The 1973 decision of *United States v. DeBartolo*, 482 F.2d 314 (1st Cir. 1973) relies on *Freed* and on this Court's decision rendered in *United States v. International Minerals*

Corp., 402 U.S. 558 (1971) in holding that violations of the National Firearms Act were strict liability crimes. In *DeBartolo*, the Court stated "one knowingly participating in the sale of such a lethal instrumentality cannot escape liability by failing to inspect the length of its barrel any more than by failing to inquire whether it is registered." *DeBartolo*, 482 F.2d at 316. The unregistered weapon which DeBartolo possessed was a sawed-off shotgun. Defendant DeBartolo was no stranger to firearms – he dealt in guns, owned a skeet range, tested and repaired guns and rifles. The court relied on this statement from *International Minerals* to affirm *DeBartolo's* conviction:

> But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation. *DeBartolo*, 482 F.2d at 316.

Unlike DeBartolo, Shilling and Morgan, the petitioner before this Court does not deal in weapons, did not possess fifty guns, nor was his weapon seized in connection with illegal drug activity. The item seized was an AR-15 sport rifle, bought at the public gun show held annually in Tulsa, Oklahoma. The flaw in reasoning in the First, Fourth, Seventh, Eighth and Tenth Circuits is that they fail to differentiate between persons such as the petitioner who have no felony convictions and who was totally unaware of the automatic capability of his "firearm" as opposed to persons such as defendant Mittleider or Shilling who were dealing in weapons and/or narcotics and who clearly *knew* of the automatic capability of their weapons. As Judge Ebel stated in his concurring opinion of the *Staples* decisions:

> Consider, for example, a situation in which a person who knows nothing about guns inherits

a rifle from a relative. Unbeknownst to the recipient, the gun is defective and occasionally discharges two rounds of ammunition after a single pull of the trigger, or perhaps it has been converted by a prior owner into an automatic weapon. Because he has no use for the rifle, the recipient stores it with other unnecessary possessions in his basement or attic without having ever used it or indeed even examined it. Under *Mittleider*, that person may be prosecuted and convicted for violation of 26 U.S.C. § 5861 and may receive a sentence of twenty-seven to thirty-three months' imprisonment. *See U.S.S.G.* § 2K2.1(a)(5).

Judge Cook, the trial judge in the instant case also expressed concerns over conviction of innocent possessors of malfunctioning guns:

> THE COURT: . . . Your example given of a person out there duck hunting, and the gun happens to fire twice when he pulls it once because it's an automatic loading gun as distinguished from an automatic firing gun, why, that's what you've been saying.[11]
>
> MR. BREWSTER: Correct. You are correct.

---

[11] The example by Mr. Brewster was stated at a pre-trial motions hearing:

> If I shoot my Browning .22 at a rabbit tonight and it doubles, I'm in possession of a machine gun. I cannot register it. What do I do? That is a ludicrous position that a person is placed in. And I'm suggesting to Your Honor that the law is that it has to fire automatically more than one shot. Congress wasn't redundant without a reason. It wasn't more than one shot with a single pull of the trigger. It's automatically more than one shot. (Transcript of proceedings, 12/13/90, pp. 14-15, Aplt. App. #J, pp. 138-139).

> THE COURT: What's the guy do? Shoot at a duck, it shoots twice, and he suddenly has become a felon.
>
> MR. BREWSTER: Not registerable.
>
> THE COURT: Well, it may or it may not be. I don't know. I'm not going to say that. But that's disturbing, because our sense of fair play to people. And it may be that the sense of fair play was such that the Congress just assumed that while it technically is a violation, the ATF wouldn't prosecute them.

One author had the following comment with regard to overzealous enforcement of gun control legislation:

> The criminal provisions of the 1968 Act are complex overlapping, and frequently technical. Unfortunately, in such a legislative scheme, federal agents and prosecutors can easily find opportunities for harassment and intimidation of the firearm-holding populace. Batey, Robert, "Strict Construction of Firearms Offenses: The Supreme Court and the Gun Control Act of 1968" 49 *Law & Contemp. Probs.* 163 (Wint. 1986). *Citing*, Staff of Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d. Sess., "The Right to Keep and Bear Arms" (Comm. Print 1982.) ("it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible").

The impact of the disparity in prosecutions was the focus of some of the legislative debate set forth herein. The words of Congressman McClure in 1986 are particularly enlightening: "crime cannot be controlled by attacking an inanimate tool." Further, as stated in the most recent decision of *United States v. Harris, supra*, "It may well be that all guns of whatever kind are dangerous, but Congress decided to require registration of

only certain kinds of firearms that it thought were highly dangerous." *Harris*, 959 F.2d at 259.

C. *LEGISLATIVE INTENT*

In order to resolve this issue, a careful analysis of the legislative intent is required. As this Court stated in *Dowling v. United States*, 473 U.S. 207, 213:

> Federal crimes, of course, "are solely creatures of statute." (citations omitted.) Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids.

The statutory provisions at issue in this case are set forth at pages 1-3. 26 U.S.C. § 5845 was amended in 1986, as part of the Firearms Owner Protection Act (PL-99-308). The legislative history is replete with comments regarding the legitimate use of sport rifles and the right to bear arms for self-protection. It is clear from even a cursory view of the legislative history that the intent of the National Firearms Act was to prevent violent crime and drug trafficking among the so-called "criminal element" in American society.

During the debate process for the 1986 Amendments to the National Firearms Act, Congressman McCollum stated:

> Throughout the amendment process, this body will work its will and develop a balance between the basic American right to bear arms and the freedom of sportsman on the one hand and adequate law enforcement on the other. I **sincerely hope that we can establish a firearms law that is directed at the criminal elements in society rather than law abiding citizens.** 132 Cong. Rec. H1658 (daily ed. April 9, 1986).

Section 101 of the Gun Control Act of 1968 similarly states:

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession or the use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law abiding citizens for lawful purposes.

During the Senate debate regarding the Firearms Owner Protection Act, which includes 26 U.S.C. § 5845(b), the following dialogue occurred:

> Mr. HATCH. Mr. President, before I cast my vote in favor of this bill, I have a further question which concerns the definition of parts for a machinegun. *The language of the bill is clear, but a member of my staff has pointed out that the description of this provision on the floor of the other body could cause it to be misinterpreted, with potentially serious consequence to those who own semiautomatic firearms which contain machinegun parts,* or those who own legally registered machineguns and possesses parts for use in repair or maintenance.
>
> Section 109 of the bill adds to the present definition of a machinegun, which includes as a registerable item "any combination of parts designated and intended for use in converting a weapon into a machinegun." The new language of the bill adds: "any part designed and intended solely and exclusive * * * for use in converting a weapon into a machinegun."
>
> Clearly the operative words are "for use in converting." The only reason I mention this is that the maker of the motion in the other body

described it somewhat ambiguously as including "a 'part' that is intended solely and exclusively for a machinegun." That is not what the bill says, and it is of great importance to many law abiding citizens that it be interpreted exactly and so clearly and unambiguously written . . .

Mr. HATCH. In other words, the mere fact of possession of a single part designed for a machinegun would not require registration and payment of the transfer tax unless that single part would of itself be capable of converting a weapon to a machinegun?

Mr. McCLURE. The Senator is correct. Only if an individual possessed a single part or combination of parts with which conversion could be accomplished with the part or parts would part or parts be subject to the transfer tax. . . .

Mr. McCLURE. Mr. President, make no mistake. I believe that the second amendment means exactly what it says. I believe that our forefathers intended for all honest citizens to be able to arm themselves. This is not a privilege meted out by the Government – it is a sovereign right, belonging to the people themselves.

I also believe that attempts to control violent crime by nibbling away at this right are doomed to fail.

The Gun Control Act of 1968 was more than a nibble – it was a big bite. This may come as a surprise to many, but I share the intention of Congress in passing that law. *All of us want to wipe out violent crime. Unfortunately, the 1968 act did not achieve that goal. This is not surprising. Crime cannot be controlled by attacking an inanimate tool.*

The Firearm Owners Protection Act is a complicated bill – it amends a complicated law. This is

part of the problem. In an attempt to control the possession, transportation and sale of firearms, Congress and the enforcing agency developed a tangle of redtape. The end result has been the entrapment of otherwise honest people into violations that neither hurt anyone, nor contribute to violent crime. The aim of the Firearm Owners Protection Act is to redirect law enforcement toward the kind of transaction most likely to be a factor in violent firearms crime. In other words, we have to stop going after the guy who transposes a number in a zip code, and go after the dealer who is knowingly selling stolen guns, or knowingly selling to prohibited persons.

Briefly, the following are the main points of the bill. . . .

Mandate an element of criminal intention for prosecution and conviction of Federal firearms law violations.

132 Cong. Rec. S5363 (daily ed. May 6, 1986). (Emphasis Added.)

Thus, this discussion clearly supports the testimony of the defense experts at petitioner's trial that the filing of the selector switch, in and of itself, does not make this AR-15 a machinegun subject to registration. The selector switch is not the conversion kit for this AR-15. The *autosear* is the conversion kit and it was plainly established at trial that this sport rifle was not equipped for an autosear. The passion behind the 1986 amendments to the Gun Control Act was fueled by the abuse of civil liberties "perpetrated against real people" by law enforcement. Examples of such cases are cited during the legislative debates. By Congressman Volkmer:

> Let's talk about David Moorhead, a decorated and disabled Vietnam Veteran. Moorhead's gun shop, located in a small New Hampshire town, was visited by an undercover agent who asked

if Moorhead would make an illegal sale. Moorhead instead noted his auto license plate and called ATF to report the man. But the informant saw in Moorhead's shop an M-14 which Moorhead had bought from a boy scout leader and kept as a memento of his service. Although the gun was semiautomatic, ATF's experts felt it was originally designed to work, if fitted with extra parts, as a machinegun. ATF sent a team of agents to raid the shop and take Moorhead into custody on felony charges. Following their policy of involving local officials in a search party, the agents had taken the county Sheriff with them. But the Sheriff immediately agreed to become a character witness for Moorhead.

At the trial, the prosecution argued that good faith was no defense. Moorhead should be subject to 10 years' imprisonment for an honest act. Judge Bownes, since elevated to the circuit, had the courage to dismiss the case. From the bench, he asked Moorhead to stand. The Judge apologized to him on behalf of the United States, calling the case a travesty. Moorhead, who at this point was indigent, was still being sued by ATF for license revocation and forfeiture of the rifle. Under these pressures, he finally gave up his gun shop. 132 Cong. Rec. H1651 (daily ed. April 9, 1986).

Abuses such as David Moorhead and the petitioner before you are likely to continue when prosecutorial bodies are armed with ambiguous legislation which carry burdensome penalties.

D. *APPLICATION OF CONGRESSIONAL INTENT BY CIRCUIT COURTS HAS CAUSED A RECENT TREND REQUIRING PROOF OF KNOWLEDGE THAT THE ITEM POSSESSED IS A "FIREARM"*

This legislative history, in part, inspired the Fifth Circuit Court of Appeals to overturn its own precedent in *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) *(en banc)*.[12]

On rehearing *en banc*, the Fifth Circuit Court of Appeals stated in the *Anderson* decision:

> Countless numbers of semiautomatic weapons stand in the closets and gun cabinets of this land. Several of the most popular shotgun models, many handguns, and not a few rifles are autoloaders; and either wear and tear or a simple operation can convert any of these from a firearm in the ordinary sense into a "firearm" in the sense defined by the Act. Where, as here, the criminal charge is that of possessing such an arm – one that looks like only a firearm but is in fact a "firearm" – we conclude that a conviction should require that the charged party knew it was a "firearm" in the *Act* sense, not that he (or she) merely knew it was a firearm. . . .
>
> We overrule *Vasquez*, under which innocent possession of a worn or altered autoloader can result in jail time. Such a rule is unjust and dangerous, and there is little if any need for it. For in most cases, as in this one, *mens rea* will be provable if it exists.
>
> * * *
>
> *It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens*

---

[12] The predecessor decision of *United States v. Anderson* is reported at 853 F.2d 313 (5th Cir. 1988).

> *to a possible ten-year term of imprisonment if – unknown to them, and without reasonable cause on their part to think otherwise – what they genuinely and reasonably believed was a conventional semi-automatic pistol turns out to have worn down into or been secretly modified to be a fully automatic weapon.*

Anderson, 885 F.2d at 1251, 1254, 1255. (Emphasis added.)

In *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992) (*per curiam*), the Court of Appeals agreed with the reasoning of the *Anderson* court as well as that of the Sixth and Ninth Circuits. In *Harris*, the defendants were convicted of various charges in connection with narcotics offenses. The defendants were convicted pursuant to 26 U.S.C. § 5861(d) (the statute at issue in the instant case) and 18 U.S.C. § 924(c). Section 924(c) makes it a separate offense to use a firearm in connection with a drug trafficking offense, increasing the penalty drastically if the weapon is a machinegun. *Harris*, 959 F.2d at 257. The court stated:

> In prosecutions under § 5861(d), unlike those under § 924(c), the defendant is not necessarily someone who has already been proven to have engaged knowingly in criminal behavior with the very gun in question. Instead, it might be any person who has come into possession of an automatic weapon, and who quite possibly has no reason to be aware that the weapon is a 'firearm' within the meaning of the statute.

Harris, 959 F.2d at 259.

The Harris court stated with regard to congressional intent:

> It may well be that all guns of whatever kind are dangerous, but Congress decided to require registration of only certain kinds of firearms that it thought were highly dangerous. Were we to accept the government's argument that so long as a defendant has knowledge that he possesses

> a gun of any type, the defendant is absolutely liable for possessing a proscribed "firearm," we would implicitly expand Congress' negative judgment concerning the possession of certain particularly dangerous guns to all guns. . . .
>
> We believe that if Congress, against the background of widespread lawful gun ownership, wished to criminalize the mere unregistered possession of certain types of firearms – often indistinguishable from other, non-prohibited types – it would have spoken clearly to that effect. We do not see how the line between the individual who knowingly possesses a gun of some kind but not a firearm within the meaning of the statute and an individual who possesses a "firearm" not even realizing it is a gun.

Harris, 959 F.2d at 259, 260. The facts presented at trial of the petitioner, and set forth herein, show that the petitioner did not know, nor did he have reason to believe, that he possessed a "firearm" as that term is defined within the National Firearms Act. The petitioner respectfully urges this Court to follow the trend of recent circuit court decisions which require the government to prove that the defendant knew he possessed a "firearm" within the meaning of the Act.

E. THE COURT SHOULD APPLY THE RULE OF LENITY

The petitioner respectfully urges this Court to apply the "rule of lenity" in interpreting 26 U.S.C. § 5861(d). Strict statutory construction of penal laws is tradition in this Court. In *Dowling v. United States*, 473 U.S. 209 (1985), Justice Blackmun quoted Chief Justice Marshall's words expressed in 1820 which sets forth the basic rationale for the rule of lenity:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820).

In *Liparota v. United States*, 471 U.S. 419 (1985), the defendant was charged with violating 7 U.S.C. § 2024(b)(1). That statute penalizes knowing uses of food stamps in any manner not authorized by statute or regulation. This Court applied the rule of lenity and reversed the defendant's conviction. In so reversing, the Court stated that criminal offenses requiring no *mens rea* have a generally disfavored status:

> The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute. *United States v. Hudson*, 7 Cranch 32 (1812). With respect to the element at issue in this case, however, Congress has not explicitly spelled out the mental state required. Although Congress certainly intended by use of the word "knowingly" to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. . . .
>
> **In addition, requiring *mens rea* is in keeping with our long-standing recognition of the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."** *Rewis v. United States*, 401 U.S. 808, 812 (1971). See also *United States v. United States Gypsum Co., supra*, at 437; *United States v. Bass*, 404 U.S. 336, 347-348 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). **Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.** See *United States v. Bass, supra*, at 348 ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear.

Liparota, 471 U.S. 424, 427. (Emphasis added).

In the recent United States Supreme Court decision of *United States v. Thompson/Center Arms Company*, ___ U.S. ___, 112 S.Ct. 2102 (1992), this Court applied the rule of lenity to interpret an ambiguous statute. Thompson/Center was required by the ATF to pay a $200 tax pursuant to 26 U.S.C. 5861 for "making" a "firearm." Thompson/Center manufactured the "contender" pistol and, for a short time, manufactured a conversion kit which shortened the barrel of the pistol arguably making it a "firearm" as defined by 26 U.S.C. 5845. At the outset, this Court stated that "the word 'firearm' is used as a term of art in the NFA."[13] This Court also stated:

---

[13] Accord, *Anderson*, 885 F.2d at 1251, where the court found that a "firearm" as that term is used in the NFA:

> bears little if any correspondence to that in common usage, much as though the word "animal" were defined in some suppositious National Zoo Act to

> It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, just as the regulation of short barrelled rifles, for example, addresses a concealable weapon likely to be so used.

Thompson/Center, 112 S.Ct. at 2109.

Because Thompson/Center's actions may be subject to criminal sanction and because the statute was ambiguous, the rule of lenity was applied to resolve the ambiguity in Thompson/Center's favor. *Thompson/Center*, 112 S.Ct. at 2101. As Justice Stevens states in his dissenting opinion:

> The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.

The *Staples* jurors were instructed that an element of this offense was **knowing** possession of the firearm described in the indictment." Although § 5861(d) is silent as to the element of knowledge, this statutory silence on the issue of *mens rea* is not determinative. This Court has stated:

> Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement. . . . the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law.

---

exclude all mammals, reptiles and birds, except lions and tigers, but to include freight trains, teddy bears, feather boas and hall trees.

United States v. United States Gypsum Co., 438 U.S. 422, 438 (1977); *Liparota v. United States*, 471 U.S. 419, 426 (1984).

The rule of lenity, if applied in this case, should lead to a reversal of the conviction of the petitioner. If the prosecutor is required to prove, beyond a reasonable doubt, that the petitioner has knowledge of the qualities of his weapon which make it a "firearm" within the meaning of § 5845 and § 5861(d), the petitioner respectfully submits that a trial would result in a judgment of acquittal. It is clear in this case that this petitioner had no idea that his AR-15 sport rifle could malfunction to produce multiple shots. Further, the petitioner did not know nor did he have reason to know that the stop had been filed or worn down. More importantly, the government wholly failed to prove *when* the stop was filed down or that the petitioner filed the stop.

The rule of lenity would have been applied in *United States v. Anderson*, 853 F.2d 313 (5th Cir. 1988) by the Fifth Circuit had it not been bound by precedent. The Court stated:

> We believe that as a matter of statutory construction, requiring some degree of knowledge of the *facts* that make a weapon a "firearm" within the meaning of the Act is preferable to not requiring such knowledge. The recent case of *Liparota v. United States*, 471 U.S. 419 (1985) is instructive on this point. In *Liparota*, the Supreme Court addressed the issue of whether in a prosecution for unauthorized acquisition or possession of food stamps, under 7 U.S.C. Sec. 2024(b)(1) "the government must prove that the defendant knew that he was acting in a manner unauthorized by statute or regulations." [In answering in the affirmative] the Supreme Court reasoned that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct. The Court also noted

> that "requiring *mens rea* is in keeping with our long-standing principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' "

Anderson, 853 F.2d at 318, 319.

The petitioner respectfully urges this Court to apply the rule of lenity and resolve the ambiguity present in 26 U.S.C. § 5861(d) and § 5845 in favor of the petitioner.

CONCLUSION

For the above reasons, petitioner respectfully urges this Court to reverse the court of appeals judgment and reverse the conviction of the petitioner.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 9 1993
OFFICE OF THE CLERK

No. 92-1441

In the Supreme Court of the United States

OCTOBER TERM, 1993

HAROLD E. STAPLES, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court erred in instructing the jury that, in order to convict petitioner of a violation of 26 U.S.C. 5861(d), the government was required to prove only that petitioner knew that the weapon he possessed was a dangerous device of the type that would alert one to the likelihood of regulation, and not that he knew it possessed all the physical characteristics of a machinegun.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1441

HAROLD E. STAPLES, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 971 F.2d 608. The opinion of the district court denying petitioner's motion to set aside the verdict (Pet. App. 34a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1992. A petition for rehearing was denied on November 4, 1992. On January 22, 1993, Justice White granted petitioner an extension of time to and including March 4, 1993, within which to file

a petition for a writ of certiorari. The petition was filed on that date and was granted on May 24, 1993. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. 5845 provides, in relevant part:

> For the purpose of this chapter—
>
> (a) Firearm
>
> The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.
>
> (b) Machinegun
>
> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more

> than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. 5861 provides, in relevant part:

> It shall be unlawful for any person—
>
> * * * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record * * *.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on one count of knowing possession of an unregistered machinegun, in violation of 26 U.S.C. 5861(d).[1] He was sentenced to five years'

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[1] The single-count indictment charged that petitioner "knowingly received and possessed firearms," described as follows:

> a. Inland Model M1 .30 caliber carbine, serial number 5222984;
>
> b. SGW Model XM1, .223 caliber rifle, serial number X2606
>
> both of which had been modified so as to be machineguns, and neither of which were registered to Harold E. Staples, III, in the National Firearms Registration and Transfer Record.

C.A. App. 1-2. The jury found petitioner guilty of knowing possession of the unregistered .223 caliber rifle. Tr. 477.

probation and a $5,000 fine. The court of appeals affirmed. Pet. App. 1a-31a.

1. Under 26 U.S.C. 5861(d), part of the National Firearms Act (NFA), ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. 5801-5872), it is "unlawful for any person * * * to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." The statute defines the term "firearm" to include "a machinegun," 26 U.S.C. 5845(a)(6), and it defines the term "machinegun" to mean

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include * * * any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. 5845(b).

On December 29, 1989, agents of the Jenks, Oklahoma, Police Department and the Bureau of Alcohol, Tobacco and Firearms executed a search warrant at petitioner's house. Tr. 25. The agents found an M-1 automatic carbine in a bathroom closet and an AR-15 assault rifle lacking a magazine and bolt carrier in petitioner's office. Tr. 27, 35-36. When the agents attempted to complete the search of the office, petitioner protested, claiming that it contained papers relating to an investigation in which he was assisting the FBI. Tr. 272, 278. The agents then examined a briefcase located in the portion of the office petitioner sought to prevent the agents from searching. Inside

the briefcase, the agents found an M-16 bolt carrier. Tr. 36-37.

The AR-15 is the civilian version of the military's M-16 rifle. The M-16 is a selective fire machinegun; the operator can manipulate a selector switch to fire it in either a semi-automatic or fully automatic mode. By contrast with the M-16, an unmodified AR-15 is a semi-automatic rifle; it can fire only one shot with each pull of the trigger. Tr. 111-112. At trial, however, the government's firearms expert testified that, upon examination of petitioner's AR-15, he discovered that the weapon had been modified by the substitution of certain M-16 selective fire components for AR-15 semi-automatic fire components, including a hammer, disconnector, trigger, and selector switch. Tr. 98-99.

The AR-15 is manufactured with a metal stop on its receiver to prevent an M-16 selector switch, if installed, from rotating to the fully automatic positon. Tr. 101-102. But the metal stop on petitioner's AR-15 had been filed away, leaving a shiny spot on the otherwise black receiver. *Ibid.* The government's expert explained that, with those modifications, petitioner's AR-15 was capable of firing in a fully automatic mode. Tr. 110-111. He testified that, when he test fired the weapon after inserting the M-16 bolt carrier and rotating the selector switch to the automatic fire position, it fired automatically. Tr. 104. The expert therefore concluded that the weapon was a machinegun. Tr. 105. The weapon had not been registered in the National Firearms Registration and Transfer Record, as required by 26 U.S.C. 5861(d). Tr. 58.

At trial, petitioner did not dispute that his modified AR-15 was capable of firing in an automatic

mode. Instead, he presented expert testimony that, absent an additional M-16 part, known as an auto-sear, even an AR-15 equipped with M-16 selective fire parts was not a true automatic weapon. Tr. 306, 326. Petitioner's expert further stated that, in his opinion, the automatic firing capability of petitioner's AR-15 was the result of a malfunction, known as "followdown," created by the failure of the disconnector to retain the hammer in a cocked position after the discharge of each round. Tr. 327-328. That type of malfunction, the defense expert stated, could be induced by cleaning and lubricating the weapon, reducing the number of rounds in the magazine, or using ammunication with sensitive primers. Tr. 329-330.

Petitioner testified in his own behalf. He asserted that he believed the weapon to be defective and claimed that he had been unable to get it to function in a semi-automatic mode, let alone as a fully automatic weapon. Tr. 376. As a result, he stated, he gave the AR-15 to his nephew on the condition that his nephew agree to have the weapon repaired. Tr. 377. He said that he had been keeping the weapon for his nephew, who was serving in the National Guard, when it was found in his house. Tr. 381. Petitioner denied any knowledge that the selector switch stop had been filed down or that the weapon was capable of firing in a fully automatic mode. Tr. 382, 383.

At the close of trial, petitioner proffered an instruction to the effect that "[a]n essential element of the offense of possessing a machinegun, is that the possessor knew that the gun would fire fully automatically and the burden is upon the [prosecu-

tion] to prove that specific knowledge." Pet. App. 11a n.6. The district court declined to give that instruction. Instead, the court instructed the jury that "[t]he indictment charges that the defendant knowingly possessed two different firearms." Tr. 464. With respect to the element of knowledge, the court explained (Tr. 465):

> [A] person is knowingly in possession of a thing if his possession occurred voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one can be convicted of possession of a firearm he did not intend to possess. The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it][2] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation. If he has such knowledge and if the particular item is, in fact, regulated, then that person acts at his peril. Mere possession of an unregistered firearm is a violation of the law of the United States, and it is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed the firearm.

After the jury returned a verdict of guilty, petitioner moved to set it aside on the ground that the government had failed to establish that he knew the rifle was capable of firing in a fully automatic mode.

[2] In an apparent mistranscription, the transcript contains the word "suggested" instead of "which subjects it."

Relying upon the holding of the Tenth Circuit in *United States* v. *Mittleider*, 835 F.2d 769, 774 (1987), cert. denied, 485 U.S. 980 (1988), the district court denied petitioner's motion. Pet. App. 34a.

3. The court of appeals affirmed, rejecting petitioner's claim that the district court had improperly instructed the jury on the knowledge requirement under Section 5861(d). Following circuit precedent, the court held that, in order to obtain a conviction under 26 U.S.C. 5861(d), " 'the government is not required to prove knowledge of a weapon's physical properties' "—in particular, that it is capable of automatic fire. Pet. App. 11a, quoting *United States* v. *Mittleider*, 835 F.2d at 774.

Judge Ebel concurred on the ground that the court was bound by its earlier holding in *Mittleider*. However, because he believed that the statute, as construed in that case, could lead to unfortunate results where a defendant is truly ignorant of a firearm's capability to fire automatically, he would have required proof of the defendant's knowledge of that capability had he not been bound by circuit precedent. Pet. App. 22a-31a.

SUMMARY OF ARGUMENT

By its terms, 26 U.S.C. 5861(d) does not require the government to prove that a defendant charged with possession of an unregistered weapon knew that the weapon had all of the characteristics subjecting it to registration under the National Firearms Act. The court of appeals correctly held that it would be inappropriate to read such a requirement into the statute.

This Court has held, in two categories of cases, that similar knowledge requirements may be read

into criminal statutes that do not specify an intent element. First, where a statute codifies a common law crime, it is assumed that Congress did not intend to alter the intent applicable to the common law crime. See *Morissette* v. *United States*, 342 U.S. 246 (1952). Second, where a statute criminalizes apparently innocent conduct that does not appear to present a hazard to the community, the Court has held that implication of a similar knowledge requirement may be appropriate. See *Liparota* v. *United States*, 471 U.S. 419 (1985).

This case does not fall within either of those two categories. Instead, it falls within a third category of offenses by which Congress seeks to regulate highly dangerous items that reasonably should be known to be subject to regulation. In a series of cases dealing with offenses involving regulation of narcotics, see *United States* v. *Balint*, 258 U.S. 250 (1922), misbranded or adulterated drugs, see *United States* v. *Dotterweich*, 320 U.S. 277 (1943), and shipment of hazardous substances, see *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558 (1971), this Court has made clear that the highly dangerous nature of those substances, coupled with Congress's intent to impose a regime of strict control of such substances, renders implication of a rigorous knowledge requirement inappropriate. A defendant may be convicted of such offenses so long as the government proves that he knew the item at issue was highly dangerous and of a type likely to be subject to regulation.

The rationale of those cases is directly applicable to Section 5861(d), which was enacted as a public welfare measure to regulate the circulation of highly

dangerous weapons such as machineguns. In *United States* v. *Freed*, 401 U.S. 601 (1971), this Court applied that rationale to the question whether the government must prove that a defendant under Section 5861(d) knew that the weapon he possessed was unregistered. In light of *Freed*, a substantial majority of the courts of appeals have held that conviction under Section 5861(d) does not require proof that the defendant knew the weapon he possessed had all the physical characteristics of a weapon required to be registered under federal law.

Petitioner contends that the legislative history of various amendments to the National Firearms Act supports his position. But those amendments demonstrate Congress's desire to regulate "convertible" weapons of the type possessed by petitioner in this case. They also show that Congress has consistently refused to add knowledge requirements to Section 5861(d) that would put a premium on ignorance and make it more difficult to achieve the goal of universal registration of machineguns and other registrable weapons. And Congress's refusal to do so has come at a time when it was imposing just such knowledge requirements with respect to other NFA offenses and even though at the time Congress acted the unanimous course of judicial decisions had rejected petitioner's construction of the statute.

Contrary to petitioner's contention, it would not be appropriate to apply the rule of lenity to read a rigorous knowledge requirement into Section 5861(d). There is no ambiguity in that provision that would trigger application of the rule of lenity, and such a requirement would be inconsistent with Congress's regulatory purpose in enacting the NFA. Moreover,

this Court has never applied the rule of lenity to read a rigid knowledge requirement into other public welfare statutes imposing similar registration or regulatory requirements on items that are inherently dangerous to the community.

ARGUMENT

IN A PROSECUTION UNDER 26 U.S.C. 5861, IT IS UNNECESSARY FOR THE GOVERNMENT TO PROVE THAT THE DEFENDANT HAD ACTUAL KNOWLEDGE THAT A FIREARM IN HIS POSSESSION HAD ALL OF THE PHYSICAL CHARACTERISTICS MAKING IT SUBJECT TO REGISTRATION UNDER THE NATIONAL FIREARMS ACT

Section 5861(d) provides that "[i]t shall be unlawful for any person * * * to receive or possess a firearm which is not registered to him in the United States Firearms Registration and Transfer Record." The plain language of the statute requires proof by the government that a defendant charged with violating Section 5861(d) "receiv[ed]" or "possess[ed]" a "firearm" and that the "firearm" was not registered in the Firearms Registration and Transfer Record. Although petitioner challenged the instructions and the adequacy of the evidence on those elements in the courts below, he did not renew his challenge in his petition for certiorari. Therefore, it must be taken as settled that the weapon at issue in this case—petitioner's modified AR-15—was a machinegun as defined by the statute and was possessed by petitioner as charged in the indictment.[3]

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[3] Petitioner contends that the modified AR-15 was not capable of fully automatic fire without the "autosear" described by his expert witness, and that "the government

The plain language of Section 5861(d) does not require the government to prove any element of knowledge or intent and, in particular, it does not require the government to prove that petitioner knew that the AR-15 he possessed was capable of automatic

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wholly failed to establish when the selector switch [stop] [on his AR-15] was * * * ground off" so as to permit movement of the selector switch to an automatic firing position. Pet. Br. 4, 8, 32-33. Although petitioner presented evidence on those points, see Pet. Br. 31-32, the jury apparently credited the government's evidence rather than petitioner's.

More specifically, the government's expert witness testified that he had test-fired petitioner's weapon and that, even without an autosear, it fired automatically when the selector switch was set to the "automatic" position and the weapon was loaded with commercially available ammunition. Tr. 104; see Tr. 193. The government's expert specifically denied the suggestion of petitioner's counsel that the automatic firing was the result of a "malfunction." Tr. 194. As to the date of the modification, the dealer from whom petitioner purchased the AR-15 in 1983 testified that the selector switch stop was intact at the time of the sale. Tr. 264. And petitioner concedes (Br. 32-33), that one of the federal agents who participated in the search of petitioner's residence testified that at the time of the search he noticed "[the] dot on the side of the receiver of the weapon," which "indicated that the post had been grinded off to allow the selector switch to go into a fully automatic position." Tr. 39, 40.

Nor is there a factual basis for petitioner's related assertion (Pet. Br. 6) that the government's expert witness conceded at trial that petitioner's AR-15 could not have been registered in the National Firearms Register and Transfer Record because it lacked an autosear. In fact, the witness testified that it could not have been registered "the day before [petitioner's] house was searched" because it was contraband. After May 16, 1986, the private ownership of "newly manufactured machineguns [by] civilians" was impermissible. Tr. 217. See 18 U.S.C. 922(o).

fire. The question in this case is thus whether such a requirement should be read into the statute. Because the National Firearms Act is a regulatory statute, designed to ensure that highly dangerous weapons are either registered to their proper owners or removed from circulation, the court of appeals correctly required the government to prove only that petitioner knew that he possessed a dangerous weapon likely to be subject to regulation. That requirement is consonant with the language and purposes of the National Firearms Act, with this Court's cases concerning intent requirements in public welfare statutes, and with the decisions of a substantial majority of the courts of appeals that have addressed the question.

A. Section 5861 Is A Public Welfare Offense To Which A Rigorous Knowledge Requirement Is Inapplicable

This Court has on several occasions construed criminal statutes that do not specify an element of intent. Perhaps the leading case on that subject is *Morissette* v. *United States*, 342 U.S. 246 (1952). *Morissette* involved the question of what mental element is applicable to the offense of knowing conversion of government property, in violation of 18 U.S.C. 641. To answer that question, the Court distinguished between statutes "merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states" and those "creating an offense new to general law, for whose definition the courts have no guidance except the Act." 342 U.S. at 262.

1. With respect to the first category—traditional common law offenses and their statutory analogues—the Court observed that, as a historical matter "[c]rime, as a compound concept, generally consti-

tuted only from concurrence of an evil-meaning mind with an evil-doing hand." 342 U.S. at 251. Thus, in the case of statutory offenses derived from common law crimes, "th[e] courts assumed that omission [of language concerning mental state] did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Id.* at 252.[4]

The offense at issue in *Morissette* plainly fell within the category of codified common law crimes. Accordingly, the Court reversed the trial court's refusal to permit the defendant to argue to the jury that he believed the property he stole had been abandoned. That belief, if proved, would have constituted a defense to the charge of theft of government property.

2. *Morissette* did not, however, establish a rule that all criminal statutes that omit intent requirements should be construed to require proof that the defendant intended to commit a wrongful act. The Court distinguished the case before it from cases involving "public welfare offenses" that "do not fit neatly into any * * * accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals * * * but are in the nature of neglect where the law requires care,

[4] See also 342 U.S. at 263 ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.").

or inaction where it imposes a duty." 342 U.S. at 255. The Court explained that " 'such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.' " *Id.* at 260, quoting *United States* v. *Dotterweich*, 320 U.S. 277, 280-281 (1943).

3. The offense at issue in this case is a public welfare offense of the sort discussed in *Morissette*. There is no common law analogue to the offense of possession of an unregistered firearm under the National Firearms Act. Moreover, Congress enacted the NFA's provisions requiring registration and taxation of firearms to penalize "neglect where the law requires care," and thereby control the "public danger" posed by free circulation of hazardous weapons.

Although the definition of "machinegun" has been modified on several occasions, the statute as originally enacted in 1934 required registration and taxation of machineguns and made it unlawful to receive or possess a machinegun that had been unlawfully transferred. Act of June 26, 1934, ch. 757, §§ 4(a), 14, 48 Stat. 1236, 1237-1238, 1240. In 1934 (as today), gangster violence was a problem of enormous public concern, and the weapon of choice for the criminals whose feats terrorized the public was the machinegun. The House committee report on the bill stated that "[t]he gangster as a law violator must be deprived of his most dangerous weapon, the machine gun." H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934). As Attorney General Cummings testified, "we must, if we are going to be successful in this effort to suppress crime in America, take these ma-

chines guns out of the hands of the criminal class." *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 6 (1934). Stringent registration of machineguns, backed up by harsh penalties for failure to register, was thought to be the most effective means then available to the federal government to accomplish that end.[5] As the Committee explained, "there is no reason why anyone except a law officer should have a machine gun." H.R. Rep. No. 1780, *supra*, at 1.

B. The Intent Requirement Applicable To Section 5861(d) Is Knowledge That One Is Dealing With A Dangerous Item Of A Type Likely To Be Subject To Regulation

1. Absent clear direction in the statute, the intent element to be implied in definitions of public regulatory offenses varies in accordance with the nature of the offense. In cases in which the offense involves regulation of an item that would not ordinarily be considered a hazard to the community, a rigorous

[5] There was substantial doubt, at the time the statute was enacted, that the federal government had constitutional authority to impose an outright ban on machineguns. See generally David Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumberland L. Rev. 585, 591 (1987). Accordingly, Attorney General Cummings explained that "[w]e have followed the Harrison Anti-Narcotic Act in language so as to get the benefit of any possible interpretation that the courts may have made of that act." *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 6 (1934). The constitutionality of the Harrison Act had been upheld in *United States* v. *Doremus*, 249 U.S. 86 (1919). Congress has since concluded that a ban on machineguns is well within its constitutional authority and has enacted such a ban. See 18 U.S.C. 922(o).

knowledge element may be implied. That principle was the basis for this Court's decisions in *Liparota* v. *United States*, 471 U.S. 419 (1985), and *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).

Liparota involved a prosecution for unauthorized acquisition or possession of food stamps. This Court held that the government was required to prove that the defendant knew that his acquisition or possession of food stamps was unauthorized by statute or regulation--*i.e.*, that his conduct was wrongful. Any other result would have risked "criminaliz[ing] a broad range of apparently innocent conduct," such as simply tearing up and throwing away food stamp coupons that were sent to an individual by mistake. 471 U.S. at 426.

United States Gypsum involved a criminal prosecution for price-fixing under the Sherman Act, 15 U.S.C. 1. The Court held that the Sherman Act, though silent on the issue of intent, required proof that the defendants knew that their conduct—interseller price verification—would have an effect on prices. 438 U.S. at 444. The Court based that conclusion in part on the fact that the "behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Id.* at 440-441. Serious fair notice and overdeterrence problems would be raised by criminal regulation of conduct that was apparently innocent and posed no obvious risk of danger to the community. Cf. *Lambert* v. *California*, 355 U.S. 225, 228-230 (1957).

But where a criminal statute involves regulation of a highly hazardous substance—and especially where it penalizes a failure to act or to comply with a registration scheme—the defendant's knowledge

that he was dealing with such a substance and that it was likely to be subject to regulation provides sufficient intent to support a conviction. In *United States* v. *Dotterweich*, 320 U.S. 277, 280-281 (1943), for example, the Court held that a statute prohibiting introduction of adulterated or misbranded drugs into interstate commerce was "a now familiar type of legislation whereby penalties serve as effective means of regulation." 320 U.S. at 280-281. A statute defining an offense of that type "dispenses with the conventional requirement of criminal conduct—awareness of some wrongdoing." *Id.* at 281. Instead, "[i]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Ibid.*

Dotterweich relied on this Court's earlier decision in *United States* v. *Balint*, 258 U.S. 250 (1922). *Balint* involved the violation of a narcotics statute imposing a recordkeeping requirement analogous to

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[6] As the Seventh Circuit recently explained, with respect to the precise issue in this case,

> [m]any persons must own old guns that may or may not be capable of automatic fire. Congress wants the automatic guns registered. That is going to happen only if the onus is on the owner. The approach [adopted by the courts below] requires the owner to investigate, and so leads to compliance with the law. The approach [proposed by petitioner in this case] converts ignorance into bliss. * * * Rational people would turn a blind eye, which would defeat the purpose of the statute.

United States v. *Ross*, 917 F.2d 997, 1001 (7th Cir. 1990), cert. denied, 498 U.S. 1122 (1991).

the NFA's registration requirement. The defendants in that case were charged with making a sale without filling out the requisite form. The Court held that the government need not prove that the defendants "had sold the inhibited drugs knowing them to be such." 258 U.S. at 251. Like the NFA, the narcotics statute was intended to "secur[e] a close supervision of the business of dealing in these dangerous drugs" and Congress had "use[d] a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic." *Id.* at 254. Construing the statute to impose a rigorous knowledge requirement would contravene the statutory purpose "to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute." *Ibid.*

The same point was made by this Court in *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558 (1971). The Court in that case specifically distinguished offenses regulating such commonplace, innocent items as "[p]encils, dental floss, [and] paper clips" from those regulating "dangerous or deleterious devices." *Id.* at 564, 565. With respect to such dangerous items, the "probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565. In those circumstances, "a reasonable person should know" that the item "is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota*, 471 U.S. at 433.

Dotterweich, *Balint*, and *International Minerals* do not establish that Congress ordinarily intends to dispense altogether with the requirement of criminal in-

tent in public regulatory offenses. See 402 U.S. at 563. Rather, absent contrary congressional direction, knowledge of the highly dangerous nature of the articles involved and the likelihood that they are subject to regulation takes the place of the more rigorous knowledge requirement applicable where apparently innocent and harmless devices are subject to regulation. Thus, in the context of the statute in *International Minerals* prohibiting shipment of sulfuric acid not listed on shipping papers, the Court explained that "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered [by the statute]." *Id.* at 563-564. But, so long as he knew that "some dangerous acid" was involved —even though he may not have been aware that it was sulfuric acid—his carelessness in failing to ascertain its nature and regulatory status was sufficient to establish a violation. Cf. *Dotterweich*, 320 U.S. at 281 (defendant must be shown to "stand[] in responsible relation to a public danger").

2. In *United States* v. *Freed*, 401 U.S. 601 (1971), this Court applied those principles to the statute at issue in this case—26 U.S.C. 5861(d). *Freed* presented the question whether the government had to prove that a defendant charged with receipt or possession of unregistered hand grenades knew that the hand grenades were unregistered. The Court observed that by its terms "[t]he Act requires no specific intent or knowledge that the hand grenades were unregistered." 401 U.S. at 607. The Court refused to imply such a requirement, noting that, unlike the larceny statute considered in *Morissette*, "[t]his is a regulatory measure in the interest of the public

safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609.

To be sure, the Court in *Freed* did not consider the specific question presented by this case. Because all grenades are classified as "firearms," the defendant did not argue that he mistook the grenades in his possession for articles he lawfully could have owned without registration. But the Court's reasoning in *Freed* is directly applicable here. The Court in *Freed* observed that "[b]y the lower court decisions at the time that requirement was written into the Act the only knowledge required to be proved was knowledge that the instrument possessed was a firearm." *Freed*, 401 U.S. at 607. The Court then cited *Sipes* v. *United States*, 321 F.2d 174, 179 (8th Cir.) (Blackmun, J.), cert denied, 375 U.S. 913 (1963). That case involved possession of a short-barreled rifle, which is also a "firearm" under the National Firearms Act, see 26 U.S.C. 5845(a)(3). In the cited passage, the Eighth Circuit concluded that there was "no question" that the possession was "knowing," since the defendant had "possessed it for several days" and "knew it was a gun." 321 F.2d at 179. There is no reference in the Eighth Circuit's opinion to the defendant's knowledge that the rifle possessed all of the physical characteristics of a short-barreled rifle subjecting it to registration under the NFA—*i.e.*, that its barrel was shorter than sixteen inches. See 26 U.S.C. 5845(a)(3) (defining "firearm" to include "a rifle having a barrel or barrels of less than 16 inches in length"). Thus, the understanding of both this Court and the lower courts at the time of *Freed* was that the government need

not prove that a defendant charged with violating Section 5861(d) knew that the weapon possessed all of the physical characteristics that brought it within the NFA's registration requirement.

3. The application of the principles of *Dotterweich* and *Balint* to the National Firearms Act is particularly appropriate. As in the case of misbranded drugs (in *Dotterweich*) or narcotics (in *Balint*), even guns that are not subject to the strictures of the NFA are typically governed by federal, state, and local regulation. See, *e.g.*, 18 U.S.C. 921-930; Okla. Stat. Ann. tit. 21, §§ 1272-1280, 1283, 1288-1289 (West 1983 & Supp. 1993). Thus, "one would hardly be surprised to learn" (*Freed*, 401 U.S. at 609) that there are laws that affect one's rights of gun ownership. It is consequently reasonable to "impose on the [gun owner] the burden of finding out the facts upon which his liability * * * depends and meeting it at the peril of punishment." *Balint*, 258 U.S. at 252.

The fact that the theory of defense at issue in this case could be classified as "mistake of fact" does not alter that conclusion. Although *International Minerals* involved a mistake of law,[7] *Balint*, *Dotterweich*, and *Freed* all involved mistakes of fact. In *Balint*, the Court squarely rejected the defendants' claim "that punishment of a person for an act in violation of law *when ignorant of the facts making it so* is an absence of due process of law." 258 U.S. at 252 (emphasis added). The Court explained that the emphasis of regulatory statutes such as the Narcotics Act—the statute on which the NFA was patterned, see note 5, *supra*—is "achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*." *Ibid.* Therefore, one who acts in the regulated areas does so "at his peril and will not be heard to plead in defense good faith or ignorance." *Ibid.* (emphasis added). Similarly, in *Dotterweich*, the Court cited *Balint* and emphasized that a drug "may be misbranded [or adulterated] without any conscious fraud at all." 320 U.S. at 281. And in *Freed*, the Court specifically held that the NFA "requires no specific intent or knowledge that the hand grenades were unregistered." 401 U.S. at 607. The same reasoning leads to the parallel conclusion that petitioner could have violated the NFA without knowing that his weapon was a machinegun.

4. The intent instruction given in this case was an accurate statement of the law. The instruction required the government to prove that petitioner "knowingly" possessed the machinegun, Tr. 464, and that it was possessed "voluntarily and intentionally and not because of mistake or accident or other innocent reason." Tr. 465. But the instruction did not require the government to prove that petitioner knew his weapon "possess[ed] every last characteristic [which subjects it] to regulation"; he need only have "know[n] that he [was] dealing with a dangerous device of a type as would alert one to the likelihood of regulation." Tr. 465.

That instruction accurately describes the mental state necessary for a violation of Section 5861(d). Under the instruction, a defendant who possessed what he thought was a toy or a violin case, but which in fact was a machinegun, could not be convicted.

[7] See 402 U.S. at 560 ("[t]he sole and narrow question is whether 'knowledge' of the regulation is * * * required"). But see *id.* at 563-564 (knowledge that "some dangerous acid" is being shipped is sufficient intent to violate statute imposing recordkeeping requirement on shipment of sulfuric acid).

But proof that a defendant was on fair notice that the item he possessed was highly dangerous and likely to be regulated is sufficient to support a conviction. By showing that petitioner was "standing in responsible relation to a public danger," *Dotterweich*, 320 U.S. at 281, and that he knew he possessed an item whose "probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation," *International Minerals*, 402 U.S. at 565, the government proved that petitioner had the *mens rea* necessary to violate Section 5861(d).

5. The instruction given by the district court also comports with instructions approved by most courts of appeals. As the First Circuit held in *United States* v. *De Bartolo*, 482 F.2d 312, 316 (1st Cir. 1973), "[i]t is enough to prove [the defendant] knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril." See also, *e.g.*, *United States* v. *Kindred*, 931 F.2d 609, 612 (9th Cir. 1991); *United States* v. *Ross*, 917 F.2d 997, 1001 (7th Cir. 1990) (knowledge "that the object is a firearm [in the ordinary sense] *or* a statutory firearm * * * *or* a dangerous device apt to be regulated"), cert. denied, 498 U.S. 1122 (1991); *United States* v. *Thomas*, 531 F.2d 419, 421 (9th Cir.), cert. denied, 425 U.S. 996 (1976). Other courts of appeals have reached a similar conclusion, phrasing their test in terms of whether the defendant knew that the weapon was "a firearm, within the general meaning of that term." *United States* v. *Vasquez*, 476 F.2d 730, 732 (5th Cir.), cert. denied, 414 U.S. 836 (1973). Accord *United States* v. *Mittleider*, 835

F.2d 769, 774 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988); *United States* v. *Shilling*, 826 F.2d 1365, 1368 (4th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); *Morgan* v. *United States*, 564 F.2d 803, 805 (8th Cir. 1977); *United States* v. *Ranney*, 524 F.2d 830, 832 (7th Cir. 1975), cert. denied, 424 U.S. 922 (1976). Only the court of appeals in *United States* v. *Harris*, 959 F.2d 246 (D.C. Cir.), cert. denied, 113 S. Ct. 362 (1992), has taken the contrary position, requiring proof in every case that the defendant knew the machinegun he possessed was capable of automatic fire.[8]

C. The Legislative History Of The NFA Supports The Tenth Circuit's Decision

1. Petitioner contends (Pet. Br. 38-42) that the legislative history of amendments to the NFA supports construction of the statute to require the government to prove that a defendant knew that his weapon possessed all of the characteristics necessary for regulation under the NFA. A primary purpose of the NFA as originally enacted was to exercise stringent control over the circulation of machineguns through a strict registration and taxation scheme.

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[8] Three circuits have taken an intermediate position. They have held that, although knowledge of a weapon's specific characteristics generally is not required, such knowledge is required when the external appearance of the weapon gives no indication that it is a machinegun, even though internal modifications have rendered it susceptible to automatic firing. See *United States* v. *Anderson*, 885 F.2d 1248, 1251-1255 (5th Cir. 1989) (en banc); *United States* v. *Williams*, 872 F.2d 773, 777 (6th Cir. 1989); *United States* v. *Herbert*, 698 F.2d 981, 986 (9th Cir.), cert. denied, 464 U.S. 821 (1983); see also *United States* v. *O'Mara*, 963 F.2d 1288, 1290-1291 (9th Cir. 1992) (following *Herbert*).

See pp. 15-16, *supra*. As most of the courts of appeals have agreed, addition of a strict knowledge requirement to the statute would defeat that purpose.

2. Later amendments to the NFA do not suggest that Congress has abandoned that original purpose. To the contrary, they demonstrate Congress's increasing concern with semiautomatic rifles that are easily convertible to machineguns. Moreover, Congress amended the NFA and related statutes at a time when the courts of appeals unanimously agreed with the Tenth Circuit's construction of the statute on the issue of intent, which suggests acquiesence in, rather than disagreement with, that construction.

a. As part of the Gun Control Act of 1968, Congress amended and recodified the National Firearms Act. See Pub. L. No. 90-618, Tit. II, § 5861, 82 Stat. 1213, 1227. In revising the Act, Congress also expanded the definition of a "machinegun" to include machinegun frames and receivers, so-called conversion kits for turning other weapons into machineguns, as well as combinations of machinegun parts when in the possession of a single person. See § 5845(b), 82 Stat. 1231. The addition of those provisions demonstrates Congress's continuing concern with the dangers posed by automatic weapons—in particular, the dangers posed by convertible semiautomatic weapons like petitioner's AR-15.

The 1968 amendments also made it unlawful "to make, or cause the making of a false entry on any application, return, or record required by [the Act], *knowing* such entry to be false." See § 5861(*l*), 82 Stat. 1234 (emphasis added) (codified at 26 U.S.C. 5861(*l*)). The absence of a similar contemporaneous revision to Section 5861(d), requiring knowledge of

the particular characteristics of a weapon making it subject to regulation, supports the inference that Congress intended no revision of the generally accepted *mens rea* formulation of that section. As the Court explained in *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987), "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Accord *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981); *Russello* v. *United States*, 464 U.S. 16, 23 (1983). This Court has applied that principle where, as here, the difference in language arose from a later amendment to the statute in question. *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 267-268 (1985).

b. In 1986, Congress enacted the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, 100 Stat. 449. FOPA amended the definition of the term "machinegun" in the National Firearms Act (26 U.S.C. 5845(b)) to include any part designed and intended to be used solely and exclusively for converting any weapon into a machinegun and adopted that definition to govern the term "machinegun" as employed in the Gun Control Act, 18 U.S.C. 921(a)(23), as well. See Pub. L. No. 99-308, §§ 101(23), 109, 100 Stat. 450, 460. The House Committee Report observed that the amended definition "will help to control the sale of incomplete machine gun conversion kits that now circumvent the prohibition on selling completed kits." H.R. Rep. No. 495, 99th Cong., 2d Sess. 28 (1986).[9] That

[9] Relying on an assertion by Senator Hatch during the Senate floor debate on FOPA that "the mere fact of posses-

change was in part the result of a recommendation of the Attorney General's Task Force on Violent Crime. See H.R. Rep. No. 495, *supra*, at 28, citing U.S. Department of Justice, *Final Report of the Attorney General's Task Force on Violent Crime* 29, 32 (Aug. 17, 1981) (noting problems caused by "semi-automatic weapons * * * which can easily be converted to fully automatic weapons by simple tool work or the addition of readily available parts").

FOPA also amended the Gun Control Act of 1968, 18 U.S.C. 921-930, requiring proof of a knowing state of mind for felony violations of that Act.[10] See H.R. Rep. No. 495, *supra*, at 2. Yet Congress did not make any changes to the NFA to require that the government prove under Section 5861(d) that a defendant knew his weapon had all of the physical characteristics subjecting it to regulation.

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sion of a single part designed for a machinegun would not require registration and payment of the transfer tax unless that single part would of itself be capable of converting a weapon to a machinegun," petitioner claims that "the filing of the selector switch [stop], in and of itself, does not make [his] AR-15 a machinegun subject to registration." Pet. Br. 40-41, quoting 132 Cong. Rec. 9603 (1986). Petitioner, however, was not charged with or convicted of filing the selector switch stop or possessing any particular item designed for use in a machinegun. Instead, he was convicted of possessing an AR-15 rifle that had been modified in a number of ways so as to make it a machinegun. Senator Hatch's remarks are therefore of no assistance to petitioner.

[10] FOPA required proof of a "knowing" state of mind as a prerequisite to a conviction for certain violations such as transporting firearms, 18 U.S.C. 922(a)(4), making false or fictitious statements to a dealer in connection with the acquisition of any firearm, 18 U.S.C. 922(a)(6), shipping firearms by a common carrier, 18 U.S.C. 922(f), receiving or possessing

We recognize that it can be hazardous to draw inferences from congressional silence. See, *e.g.*, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969). But "Congress is presumed to be aware of a[] * * * judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (collecting cases). At the time FOPA was enacted, the courts of appeals were in substantial agreement that the owners of "firearms" regulated by the National Firearms Act would be held strictly accountable for ascertaining the characteristics that made them subject to regulation.[11] In enacting FOPA, Congress

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a firearm after conviction for a felony, 18 U.S.C. 922(g), receiving a stolen firearm, 18 U.S.C. 922(j), or transporting, shipping, or receiving a firearm with an obliterated serial number, 18 U.S.C. 922(*l*).

Petitioner cites a statement during the floor debates on the Senate version of FOPA that one of its purposes was to "[m]andate an element of criminal intention for prosecution and conviction of Federal firearms law violations." Pet. Br. 41, quoting 132 Cong. Rec. 9603 (1986) (remarks of Senator McClure). The legislation, however, expressly enumerated the federal firearms law violations to which Congress intended that element of criminal intent to apply. As explained, Section 5861(d) was not one of them.

[11] See cases cited pp. 24-25, *supra*. See also, *e.g.*, *United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984); *United States* v. *Woodruff*, 600 F.2d 174, 176 (8th Cir. 1979); *United States* v. *Cowper*, 503 F.2d 130, 133 (6th Cir. 1974), cert. denied, 420 U.S. 930 (1975); *United States* v. *Gardner*, 448 F.2d 617, 619 (7th Cir. 1971). In 1986, the only court that had departed at all from the consensus was the Ninth Circuit in *United States*

amended the definition of "machinegun" and made other changes in the NFA, applied the NFA definition of "machinegun" to the Gun Control Act, and modified a number of intent provisions of the Gun Control Act. But Congress took no action to overturn the then-unanimous view of the courts of appeals concerning the NFA's intent requirements. Under those circumstances, it is proper to infer that Congress did not wish to alter existing law.

D. The Rule Of Lenity Has No Application In This Case, Because The Statute Is Not Ambiguous

Petitioner contends (Br. 45-50) that the rule of lenity should be applied to this case. The rule of lenity, however, "is reserved for cases where, [a]fter sei[zing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks omitted). Thus, the rule of lenity is applicable, if at all, only "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v.

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v. *Herbert*, 698 F.2d 981, 986 (9th Cir.), cert. denied. 464 U.S. 821 (1983). That decision was at best only a minor departure. The Ninth Circuit had previously approved an instruction virtually identical to that given in this case. *United States* v. *Thomas*, 531 F.2d 419, 421 (9th Cir.), cert. denied, 425 U.S. 996 (1976). As later cases have made clear, *Herbert* holds that instruction to be inadequate only in cases in which "the external appearance was not sufficient, by itself, to put the defendant on notice that he possessed a dangerous device that was likely to be regulated." *United States* v. *Kindred*, 931 F.2d 609, 612 (9th Cir. 1991). Accord *United States* v. *O'Mara*, 963 F.2d 1288, 1290-1291 (9th Cir. 1992). See note 8, *supra*.

United States, 498 U.S. 395, 410 (1991) (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)).

Section 5861(d) is not ambiguous. Nothing in the language of the statute suggests that it requires proof that the defendant knew the specific characteristics of a proscribed firearm. The construction adopted by the Tenth Circuit in this case and by most other courts of appeals follows directly from a series of decisions by this Court. Moreover, Congress's refusal to add such a requirement to the statute, in light of then-unanimous judicial decisions rejecting it and in light of Congress's contemporaneous addition of similar requirements elsewhere in the NFA and in related statutes, makes clear that Congress was fully satisfied with the *mens rea* formulation adopted by the courts of appeals up to that time and did not intend to change it.

Nor is the majority formulation of the knowledge element of Section 5861(d) "so 'absurd or glaringly unjust,'" *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984), as to call into question Congress's intent. It is highly unlikely that a weapon purchased from a lawful outlet, such as a sporting goods store, would turn out to be a registrable firearm under the NFA, and purchasers from such outlets accordingly have little to fear. Moreover, even when a weapon is acquired on the street or altered by its owner, the fact that it is of a type subject to registration under the NFA will ordinarily be obvious to even a casual observer.[12] That is particularly true in the case of

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[12] That was true in this case. As the government's exhibits at trial demonstrated, it was obvious from a glance that the selector switch stop on petitioner's AR-15 had been filed

machineguns, since any ambiguity as to their automatic firing capability is likely to be resolved as soon as the trigger is pulled. Petitioner essentially proposes to construe the statute to protect individuals who acquire registrable firearms on the street or by altering an existing weapon, but who fail to familiarize themselves with the characteristics of their newly acquired or newly altered weapons. To adopt that proposal would frustrate Congress's purpose to require registration of such highly dangerous devices and thus keep them out of the hands of criminals.[13] Accordingly, the rule of lenity has no role here.

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down. See Gov't Exhibits 10A-10C (pictures of petitioner's weapon).

[13] Moreover, petitioner's proposal would impose on the government a frequently insurmountable evidentiary hurdle. As the dissenting judges in *United States* v. *Anderson*, 885 F.2d at 1262, observed:

> Where law enforcement officials find only weapons, unaccompanied by corroborating evidence * * *, it may be difficult to prove the possessor's knowledge of the weapon's characteristics. The defendant may not testify, or may testify that he or she was unaware that the guns were automatic. The prosecution then would depend upon circumstantial inferences that may be difficult to establish beyond a reasonable doubt. In such cases, the will of Congress to control the possession of crime-facilitating dangerous firearms [would] be unduly thwarted by virtue of [a ruling imposing such a burden].

Compare *United States* v. *Balint*, 258 U.S. at 254 (Congress omitted rigorous knowledge requirement from Narcotics Act due to "considerations as to the opportunity of the [defendant] to find out the fact and the difficulty of proof of knowledge").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60329